86-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Norman Perl,

Petitioner,

vs.

William Wernz, Director of Lawyers Professional Responsibility, et al
Respondent.

Petition For Writ of Certiorari To The Supreme Court of Minnesota

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QUESTIONS PRESENTED

1. Whether Petitioner is being deprived of his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution when the Minnesota Supreme Court vacated a final attorney disciple order and remanded to a referee for hearing:

   a. When there is no provision for such a vacating of the earlier order by the Minnesota Rules on Lawyers Professional Responsibility; and

   b. When there are no provisions for attorney discipline procedures in the Minnesota Rules of Civil Appellate Procedure.

2. Whether Petitioner is being deprived of his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution when the Minnesota Supreme Court imposed a discipline of one year suspension and through its agent rigorously enforced that suspension to the substantial detriment of Petitioner and then the State Supreme Court reversed that decision and remanded to a referee for a full discipline hearing.

3. Whether Petitioner is being deprived of his right to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution when the Minnesota Supreme Court changed the existing rules solely to effect a new and greater discipline in this particular case.

4. Whether this Court has jurisdiction to review the State Supreme Court Order which Petitioner contends was entered without any authority of existing court rules and which vacated an order with which Petitioner had partially complied to his substantial detriment.

THE PARTIES

Petitioner: Norman Perl, represented by Patrick J. Foley, 608-2nd Avenue South, Suite 565, Minneapolis, MN 55402.

Respondent: William J. Wernz, Director of Lawyers Professional Responsibility, 444 Lafayette Road, 4th Floor, St. Paul, MN 55101; and State of Minnesota, represented by the Honorable Hubert H. Humphrey, III, State Attorney General, 102 State Capitol Building, St. Paul, MN 55155; and Catherine Avina, Special Assistant Attorney General, 2829 University Avenue S.E., #136, Minneapolis, MN 55414.

TABLE OF CONTENTS

APPENDIX INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota.

Petitioner.

JURISDICTIONAL STATEMENT

Opinions Below

The Minnesota Supreme Court entered an Order on August 1, 1986, was not reported in the National Reporter Syster, and is set forth in the Appendix. (Apx. 1). The Minnesota Supreme Court vacated that Order by an Order of October 6, 1986, which is not reported in the National Reporter System and is found in the Appendix. (Apx. 24). The Minnesota Supreme Court entered an Order on November 6, 1986 and denied this Petitioner's motion for reconsideration of the Court's earlier Order of October 6, 1986. This is not found in the National Reporter System and is included in the Appendix. (Apx. 27).

Jurisdiction of this Court

Petitioner moved the Minnesota Supreme Court for an Order suspending him from the practice of law for one year, and that Court on August 1, 1986 granted the motion.

Petitioner contends that the State Supreme Court then without any authorization by the existing, relevant court rule entered an order on October 6, 1986 and vacated the order of suspension and remanded the matter for a full hearing on discipline, with possibility of disbarment. Petitioner attacks that court order and the one entered on November 6, 1986 wherein the State Court denied Petitioner's motion to reconsider. Petitioner seeks review in this Court because the August 1 order could not have been changed under the existing rules and could not be reversed or rescinded because of Petitioner's partial compliance, to his substantial detriment, with that order of suspension. The two subsequent orders, sought to be reviewed here, deprive Petitioner of his right to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

This Court has jurisdiction to review the orders described herein by certiorari pursuant to 28 U.S.C. Section 1257(3) because those orders deprive Petitioner of rights arising under the Constitution of the United States and because this Petition presents issues of novel and important federal constitutional rights which have not heretofore been ruled on by the Court. Jurisdiction is lent by the Court's rule providing for review by certiorari when a state court has decided an important question of federal law which has not been, but should be, settled by this Court and the state court has decided a federal question in a way in conflict with applicable decisions of this Court. Rule 17.1(c), Supreme Court Rules.

This Court has jurisdiction to review the two orders attacked herein because they were granted by the State Supreme Court beyond its jurisdiction and without any procedural predicate in the relevant rules.

Constitutional Provisions Involved

United States Constitution, Amendment 5, provides in pertinent part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law * * *.

The United States Constitution, Amendment 14, provides in pertinent part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

The pertinent provisions of the Minnesota Rules on Lawyers Professional Responsibility are set forth in the Appendix. (Apx. 30).

The pertinent provisions of the Minnesota Rules of Civil Appellate Procedure are set forth in the Appendix. (Apx. 30).

STATEMENT OF THE CASE

Petitioner Norman Perl is an attorney who has been licensed to practice before the Bar of the Minnesota Supreme Court and other state and federal courts for the past 37 years. In 1986, the Director of Lawyers Professional Responsibility, who is charged with enforcing the ethical rules and practices required of attorneys in practicing law in Minnesota, filed charges against Petitioner for allegedly unethical conduct.

After extensive motions, depositions, and hearings, Petitioner submitted to the Minnesota Supreme Court an offer

to admit the charges contained in the allegations upon the condition, as allowed by Rule 10, MRLPR, Minnesota Rules on Lawyers Professional Responsibility, (Apx. 30), that the Court would impose an order suspending Petitioner from the practice of law for one year.

The Petitioner and the Director appeared for oral arguments before the Court on the conditional admission submitted by Petitioner. The Director, the respondent herein, was specifically asked by one of the associate justices of the State Supreme Court about whether there were additional facts of which the Court was unaware but could be elicited in a proceeding before the referee. The Director responded as follows:

> Mr. Wernz: Naturally any referee proceedings tends to lend color in shading and dimension to the allegations of the Petition. But, if this Court takes, as I believe it necessarily must for the purpose of considering this matter, the petition for disciplinary action of the facts and the only facts of the matter, then I believe there is a sufficient factual basis for this Court to determine what discipline is appropriate. * * *

The Director was then asked whether submitting the matter to a referee would involve the same facts that had come out in an earlier criminal case and two earlier civil lawsuits in state court, and he replied:

> Mr. Wernz: We would hope to be able to prove the allegations of the petition and hope therefore that the referee's report would embody the same factual allegations as are in the Petition. I recognize, however, that the respondent admits them only conditionally and offers in his original answer many explanations and even denial. (Apx. 35-36).

The Director proceeded as follows:

> Mr. Wernz: May it please the Court, counsel. I am here at the Court's request to tell you why I think the conditional admission involving a one year suspension is not, on the one hand wholly unreasonable, and yet, on the other hand, is not the right thing to do. And also, finally, to suggest to you that if the Court is minded to involve itself at this stage of the proceedings further, there may be yet some other way of inducing an agreement. (Apx. 36). * * *
>
> I would, of course, desire greatly to avoid further litigation myself. To use the resources of my office in the most efficient way and to avoid any unnecessary litigation. It would be expedient from that point of view to accept the conditional admission and one year suspension. Which I agree is not a slap on the wrist. But it is not a matter of expedience that is before the Court today, it is what is right and for the following reasons I suggest to you that the one year suspension is simply insufficient. (Apx. 36).

The Director then described in detail the charges and the evidence in relationship to Petitioner's alleged past actions giving rise to the charges. (Apx. 36). He concluded,

> However, as I say, it's a difficult case to size up and evaluate and I would concede that disbarment is not the only reasonable disposition. I would concede that suspension is a reasonable disposition but not the one I recommend. I would not concede that a short suspension of one year is reasonable. I believe that a suspension in the area of three to five years is a reasonable disposition. The reason that I say that three years is, or five years is more appropriate, is that I believe it is commensurate with the misconduct. (Apx. 39).

Upon questioning by one of the Supreme Court Justices as to whether the court would get any different situation after some litigation, the Director stated:

> Mr. Wernz: * * * But to take the question head on, I would like to assume that, in effect, the only thing that you would have before you that you don't have now is that the facts are not conditionally admitted but conclusively established. That is, I don't intend to prove much of anything except the petition and what gives it a little life and substance. If respondent would unconditionally withdraw his answer to the petition, and we could come before this court today or at some other time and argue to this Court or to the referee the reference back to the Court, on these facts assuming the Court knows them and we all know them, what's the appropriate disposition. I would be delighted to do that. I would be delighted to save the time. The impediment to saving that time is the respondent's answer, the part that's not conditional, which denies, qualifies, adds to, etc., a great many of the allegations of the petition. So, if we could get back to you expeditiously with just the facts that you have before you today and which you believe you know from the other cases, I would be glad to do that. (Apx. 41).

The Director explained his position in detail, summarized the evidence provoked by the charges pending before the Court, and concluded that the one year suspension was not wholly unreasonable but that he would recommend a greater suspension.

The Minnesota Supreme Court on August 1, 1986 entered the extensive order sought by Petitioner; and the Court specifically observed that "the Director responded that while the terms of the conditional admission were not

'wholly unreasonable,' he could not recommend the tendered disposition." (Apx. 3). The State Supreme Court did point out that the Director was ready to proceed in whatever fashion the court found appropriate. *Ibid.* The court said that,

> Because of unique circumstances, however, we have had the matter fully argued before us, and we have concluded to act on the motion here. This proceeding is unique because this Court is already quite conversant with the facts and circumstances, more so than a referee would be at this juncture. (Apx. 5).

The State Supreme Court granted Petitioner's motion for suspension of Petitioner from the practice of law for a period of one year. (Apx. 10). The Court ordered some additional terms and conditions not critical here.

Petitioner strictly complied with the Supreme Court's Order and acted under the insistence and instruction of the respondent director, all to Petitioner's substantial detriment. The Director on August 4, 1986 notified Petitioner's counsel of the effective date of the Court's Order, that date, that Petitioner must comply with the Court's Order and the notice requirements of the rule, must notify all state, federal, and administrative jurisdictions where Petitioner is admitted to practice with respect to his suspenson, and comply with the Court's Order. (Apx. 45). Additional attachments show Petitioner's diligent attempt at seeking additional information as to his authority to sign checks and other administrative matters; he filed an affidavit with the Director to the effect that he complied with all of the orders, filed notices that he had sent in connection with the required rule, ordered new stationery for his former law firm without

his name on the stationery letterhead, and stopped signing law firm trust account checks. (Apx. 47).

Petitioner in addition to removing his name from the law firm withdrew as an officer of the professional corporation of which he had been an officer and shareholder, withdrew as a shareholder, notified his clients that he had been suspended, informed each client that he or she could continue with Petitioner's former law firm or retain someone else. (Apx. 59).

From August 4, 1986, the Director, respondent herein, vigorously enforced the terms of the suspension and also requested a rehearing by the Supreme Court with respect to the length of the suspension. Petitioner was irreparably harmed by the enforcement by the Director of the terms of suspension and proceeded in good faith because of the plain terms of Rule 10, MRLPR, which does not in any way provided for a rehearing or a vacating of an order of suspension following a conditional admission. (Apx. 30).

The State Supreme Court on October 6, 1986, two months after it had suspended Petitioner, entered an Order on the Director's Petition for a Rehearing but, instead of granting a rehearing, vacated the Order of August 1, 1986 and remanded the matter to the referee for a hearing. Petitioner contends that this was an Order without any justification and more importantly without any rule authorizing the Court to enter an order vacating the acceptance of the conditional admission and suspension.

Petitioner then for the first time was informed of the constitutional dimensions. Petitioner was thereby subjected to a novel interpretation of the State Supreme Court's rules and sought protection of Petitioner's constitutional rights, clearly within the procedural texture of *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. *cert. den.* 417 U.S. 962.

Attempting to protect his constitutional rights, Petitioner filed a motion for reconsideration of the October 6, 1986 Order and cited the Court's violation of his right to due process of law (Apx. 84). That Petition cited in detail the prejudice to which Petitioner had been exposed by his compliance with the Court's Order of suspension on August 1, 1986. (*Ibid*). Petitioner's brief filed in support of the motion for reconsideration asserted that the state court's vacating of the earlier order had violated his protections against double jeopardy and privation of due process under the Fifth and Fourteenth Amendments, (Apx. 93). Petitioner asserted that the Minnesota Rules on Lawyers Professional Responsibility preclude the rehearing or the vacating, Apx. 96, and that the Minnesota Rules of Civil Appellate Procedure would not apply. (Apx. 96). It was therefore the assertion by Petitioner that the Court had ruled in violation of the only applicable rules, MRLPR, and deprive Petitioner of his right to constitutional due process of law.

The Court then entered an Order on November 6, 1986 and attached a memorandum repeating Petitioner's constitutional arguments and made the rather astounding conclusion as follows:

> This Court has authority to reconsider its rulings in disciplinary matters, both under its inherent powers and under Minn. R.Civ. App. P. 140, and has an established practice of doing so. See, e.g., *in Re Tracy*, 19735, 266 N.W. 142 (1936); *In Re McDonald*, 204 Minn. 61, 282 N.W.2d 677 (1938). (Apx. 28).

The court manifestly erred in citing the Minnesota Rules of Civil Appellate Procedure and erred in both the citing and interpreting the two cases contained in its opinion.

The State Supreme Court then dismissed the constitutional principles as follows:

> Although aware a petition for rehearing was pending, Petitioner neither asserted a right to a stay of suspension under Rule 140.03 nor applied for a stay. Instead, respondent chose to withdraw from the practice of law on the assumption that petition would be denied. Because respondent guessed wrong does not entitle him to claim estoppel, much less res judicata. (Apx. 29).

The State Supreme Court therefore for the first time held that the Minnesota Rules of Civil Appellate Procedure apply to attorneys' discipline proceedings, although the discipline rules, MRLPR, provide as follows:

> Rule 2. It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed of and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted. Such investigation and proceedings shall be conducted in accordance with these Rules. (Apx. 29).

Because the lawyers procedural rules, by Rule 2, just quoted, specifically limits discipline procedures to those rules, and because no court has ever applied the Minnesota Rules of Civil Appellate Procedure to lawyers discipline cases, and because the Rules of Civil Appellate Procedure manifestly exclude lawyers discipline procedure, Rule 101, Minnesota Rules of Civil Appellate Procedure, (Apx. 32), it is apparent that the Court has tortured out a novel device solely to extricate itself from an order which it knowingly granted after extensive briefing and thorough oral argu-

ments. The creation of such a novel procedure, after substantial detriment to Petitioner by his partial compliance with the earlier order of suspension, deprives Petitioner of his right to due process of law under the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW WHEN THE STATE COURT VACATED A FINAL ATTORNEY'S DISCIPLINE ORDER WITHOUT ANY COURT RULE AUTHORIZING SUCH ACTION.

(Question No. 1)

1. *This Court can review a novel state court decision prejudicing Petitioner.*

Petitioner as an attorney is in the novel position of having requested the State Supreme Court to enter an order suspending him from the practice of law. He made the appropriate motion and was heard; the Director opposed the compromise proposed by Petitioner, and he was heard. The State Supreme Court was manifestly thoroughly familiar with the matter, as demonstrated by the extensive oral arguments and responses of the Director. (Apx. 33 et seq.)

The Order vacating the Order of suspension was entered on October 6, 1986; and this was a complete surprise to Petitioner, who up until that time by reading the Minnesota Rules of Civil Appellate Procedure and the Minnesota Rules on Lawyers Professional Responsibility could detect no authorization for the Court to vacate the order of suspension or to remand it for further hearing. Petitioner thus was deprived in earlier proceedings of an opportunity, before Octo-

ber 6, 1986 to assert an argument against what would be totally unpredictable, the novel borrowing by the State Supreme Court of the rules for reconsideration and rehearing under the Minnesota Rules of Appellate Procedure. This Court and the lower federal courts are amply equipped to protect a litigant adversely affected by a novel interpretation of state law by a State Supreme Court when it militates against Petitioner's interests. See *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *cert. den.* 417 U.S. 962.

Petitioner seeks review in this Court of the constitutional issues which it presented to the State Supreme Court at the earliest practicable time. Up to the time of the Order denying Petitioner's motion for reconsideration, Apx. 27, the State Supreme Court had not suggested any authority for its October 6, 1986 order vacating the earlier order of suspension.

2. *The State Supreme Court must be held bound by its own rules and regulations.*

The State Supreme Court here clearly created a new interpretation to apply an irrelevant rule to effect a greater discipline on Petitioner after it had originally accepted his request for a one year suspension. The Court erred in stating in its order denying Petitioner's request for reconsideration that it was acting under its inherent power as well as the Minnesota Rules of Civil Appellate Procedure. Order of November 6, 1986, Apx. 28. This reflects a profound misunderstanding as to the Court's inherent powers.

Petitioner concedes that the State Supreme Court has inherent power to discipline attorneys. The complication in this case is that the Court has issued specific rules and regulations as a procedural device for disciplining lawyers.

The procedural rules have been issued, and Petitioner contends that they are specific and exclusive.

A court must be similar to any other governmental agency, and this Court has held that to permit a governmental agency to create by interpretation would be "* * * to permit administrative discretion to run riot." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 138 (1950). Although the Court may issue and amend rules and regulations, until those amendments are made, it would appear that as a matter of constitutional due process, the Minnesota Supreme Court is as bound to its own rules and regulations as was the United States Attorney General in *United States v. Shaughnessy*, 347 U.S. 260 (1954). The agent or agency issuing rules and regulations must conform to the procedural standards as a matter of due process under the United States Constitution. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959).

It is clear that the State Supreme Court in issuing its rules and regulations on the one hand for the procedures on disciplining lawyers and on the other hand for controlling civil appeals, specifically provided the procedural devices. Although those rules were issued under the Court's inherent powers, the Court thereby bound itself with following those rules until such time as the rules were properly changed. Because the State Court violated those rules, it deprived Petitioner of his right to due process of law under the Federal Constitution.

3. *The Minnesota Rules of Civil Appellate Procedure cannot apply.*

The State Court erred in relying on its Rule 140, Minnesota Rules of Civil Appellate Procedure. (Apx. 30). That,

of course, cannot apply because of the terms of those appellate procedure rules, which have been limited in their scope as provided in Rule 101, which specifically delimits the proceedings which are subject to those rules. (Apx. 32). Those rules provide for procedures in civil appeals, criminal appeals, review of orders of agencies, and other relief in civil proceedings on applications for writs. This cannot possibly be tortured into a procedural device for changing an order on lawyer's discipline because of its own order of promulgation, which specifically refers to practice and procedure in civil matters in the appellate courts of Minnesota. (Apx. 30).

The court created a last minute vehicle to justify its actions. It certainly had no authority by rule for this decision.

4. *The Minnesota Rules on Lawyers Professional Responsibility do not provide for vacating the Order herein.*

The State Supreme Court, of course, does not rely upon any procedural device in the Rules of Lawyers Professional Responsibility, the procedural rule for disciplining attorneys. Rule 10, MRLPR, provides specifically for imposing disclipline on a conditional admission. Rule 10, Apx. 30. There is no provision in the MRLPR for any reference to the Minnesota Rules of Civil Appellate Procedure. There is no rule in the Minnesota Rules of Civil Appellate Procedure to relate any authority or procedural device for any action by the Court in lawyers' discipline.

It manifestly appears that the state court merely created an excuse and cited it as a justification for its November 6, 1986 Order denying Petitioner relief.

5. *The State Supreme Court erred in citing its two cases.*

The State Supreme Court cited two cases as authority for reconsidering rulings in disciplinary matters. (Apx. —). The correct citation should have been listed as follows: *In Re Tracy,* 197 Minn. 35, 266 N.W. 88 (1936); *In Re Tracy,* 197 Minn. 35, 267 N.W. 142 (1936); *In Re McDonald,* 204 Minn. 61, 282 N.W. 677 (1938); *In Re McDonald,* 204 Minn. 61, 284 N.W. 888 (1939); *In Re McDonald,* 208 Minn. 330, 294 N.W. 461 (1940). These cases do not justify the Court in its novel creation of a device to extricate itself from the Order of suspension.

The first *Tracy* case merely involved the state Court's consideration of the accusations and then issued the order of disbarment. The second case involved a petition by the attorney for a rehearing and is described by the state court as one which "* * * is for the most part one for the modification of our decision as to details which can in no way change the result." The court added explanation of its earlier decision and modified some of the language. The court then denied the petition, but this is hardly a citation for an authority to grant an order changing terms and conditions of an earlier order of discipline which had already been enforced to the substantial detriment of the attorney.

The first *McDonald* case reviewed the evidence and ordered the attorney disbarred. There was no reconsideration there. The second *McDonald* case involved a petition by the state board to fix the cost of the proceedings. This is not a rehearing on the original punishment but a natural sequel to the Court's original order directing the payment of costs. The court then fixed the amount due. That was the only matter that was considered and granted, that is a

petition to determine the costs. The third *McDonald* case concluded that the attorney had complied with the rules and had warranted a modification of the disbarment and ordered reinstated.

Neither the two *Tracy* cases nor the three *McDonald* cases involved in any way any court consideration that the court can exercise inherent power or the rules of appellate procedure to change an order after it had been substantially complied with to the substantial detriment of the attorney. The court merely put these into a hurried order with miscitations with no detailed analysis offered by the order or suggested in the opinion.

6. *This Court has authority to protect a petitioner against novel state court decisions.*

The Minnesota rules controlling procedures for civil appeals and procedures for lawyers' discipline are by their own words mutually exclusive. As Chief Justice Marshall said in *United States v. Wiltberger,* 5 Wheat. 35, 48, 48 U.S. 76, 104 (1820), "but probability is not a guide which a court, in construing a penal statute, can safely take. We can conceive no reason why other crimes, which are not comprehended in this act, should not be punished. But Congress has not made them punishable, and this Court cannot enlarge the statute."

7. *Petitioner was deprived of due process of law.*

Petitioner was deprived of his right to due process of law when the final order was rescinded after partial compliance by him upon rigorous enforcement by the Director. The Petitioner resigned from his law firm, gave up his shares

in his professional law corporation, withdrew from practice before all courts to which he had been admitted, and notified his clients of his suspension. This was done as his good faith effort to comply with the order of suspension which he sought from the State Supreme Court and which that court, after extensive oral arguments, granted. The relief was based upon the rules then in existence.

This Court has held that the state judiciary deprives a person of constitutional due process when it eliminates remedies necessary for the enforcement of a right. *Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U.S. 673, 682 (1930). This Court has held, in *Bouie v. City of Columbia,* 378 U.S. 347 (1964), that:

> There can be no doubt that a deprivation of the right of fair warning can result not only from a vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. * * * Even where vague statutes are concerned, it has been pointed out that the vice in such enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute,' * * *.
>
> If this view is valid in the case of a judicial construction which adds a 'clarifying gloss' to a vague statute, * * * making it narrower or more definite than its language indicates, it must be *a fortiori* so where the construction unexpectedly broadens the statute which on its face had been definite and precise. Indeed, an unenforceable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, Section 10, of the Constitution forbids. * * * If a state legislature is barred by the *Ex Post Facto* Clause from passing a

> law, it must follow that the State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. *Ibid* at 352-354.

The Court there stated further,

> When a state court overrules the consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law * * *. *Ibid* at 354.

The State Court in the present case has by judicial enlargement applied in the existing case, this one, a justification or excuse for its vacating a final order which by its own terms under the procedures under which it was given was not susceptible to any vacating or amendment. That deprived Petitioner of due process of law guaranteed by the United States Constitution.

II.

PETITIONER IS DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW WHEN THE STATE COURT IMPOSED AND ENFORCED A DISCIPLINE OF ONE YEAR'S SUSPENSION AND THEN REVERSED THAT DECISION AND REMANDED THE MATTER FOR A FULL DISBARMENT HEARING.

(Question No. 2)

As a preliminary matter, it is clear that all aspects of constitutional due process apply to attorneys in discipline proceedings. *Spevack v. Klein*, 385 U.S. 511 (1967); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963). Furthermore, this Court held that attorney discipline proceedings are "adversary proceedings of a quasi-criminal nature." *In Re Ruffalo*, 390 U.S. 544, 551 (1968).

The court there stated that "disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer." *Ibid* at 550.

The punitive nature of the discipline imposed on Petitioner in this quasi-criminal proceeding should receive the same constitutional protection on finality as would be imposed in a pure criminal case by the double jeopardy clause. The fact that Petitioner desired as a matter of compromise to be suspended for one year does not militate against his constitutional right to that one year suspension once the Court granted the motion, ordered the suspension, and enforced it. Although the State Supreme Court attempts to vitiate the final order of suspension of August, Petitioner's compliance with that order of suspension demonstrates that he was placed in jeopardy, acted to his substantial detriment, and relied upon the finality of the existing rules controlling the disposition of the matter. This Court has held that the double jeopardy clause of the Fifth Amendment is applicable to the state through the due process clause of the Fourteenth Amendment. *Illinois v. Vitale,* 447 U.S. 410, 415 (1980). Due process should include protection on finality for an attorney in a quasi-criminal discipline proceeding. This important question should be reviewed by the court.

Although the present posture of the case envisions further proceedings in the state court, those proceedings are as a result of the State Supreme Court's failure to observe finality on the suspension order. This is analogous to a double jeopardy protection and this Court's interlocutory review of court orders violating the protection against double jeopardy. In *Breed v. Jones,* 421 U.S. 519, (1975), this Court held that the proscription against double jeopardy protects a juvenile who has been found delinquent and thereby pre-

cludes subsequent prosecution. The court held that the "* * * potential consequences include both the stigma inherent in such a determination * * *" and deprivation of liberty. The Court refused to accept the labeling of juvenile proceedings as civil and stated that the matter should be candidly appraised, *ibid* at 529, and pointed out that "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with the criminal prosecution." *Ibid* at 528. The court in language suited for the present problem indicated that jeopardy involves matters traditionally associated with the criminal process, such as that which "* * * imposes heavy pressures and burdens—psychological, physical, and financial—on a person charged." *Ibid* at 530. The court thus applied that protection to a juvenile proceeding, certainly analogous to the quasi-criminal aspects of a lawyer's discipline proceeding.

This Court has expressed a "deep seated bias" against retrial of issues that have already been decided, whether under the doctrine of *stare decis, res judicata,* the law of the case, or double jeopardy. *United States v. Goodwin,* 457 U.S. 368, 376 (1982). The discipline here is certainly punitive, as pointed out in *Ruffalo, supra;* and the Court has held that "probation (is) intended as a reforming discipline." *Korematsu v. United States,* 319 U.S. 432, 435 (1943). A lower court has extended double jeopardy protection to a person on probation. *Kannick v. Superior Court,* 736 F.2d 1277 (9th Cir. 1984).

This Court should review the important issues of attorneys' protection on final orders against subsequent judicial action exposing the attorney to a greater risk although the attorney had already completed a major portion of the suspension conditions to his substantial detriment. Inter-

locutory review is authorized by this Court's double jeopardy review in *Abney v. United States,* 431 U.S. 651 (1977).

III.

PETITIONER WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW WHEN THE STATE SUPREME COURT CHANGED THE EXISTING RULES SOLELY TO EFFECT A GREATER DISCIPLINE IN THIS CASE.

Question No. 3).

The Supreme Court stated that Petitioner guessed wrong when he complied with the Order of Suspension before the Court ruled on the Director's motion for reconsideration. (Apx. 29). It was Petitioner who attempted to maintain the original Order of Suspension. The respondent, the Court's Director of Lawyers Professional Responsibility, vigorously enforced that Order of Suspenson. Petitioner was placed in the untenable position of either complying with the Order of Suspension based on the final order of the Court under the existing rule or refusing to comply with the Order of Suspension and refusing to comply with the adamant insistence by the Director that great action of substantial detriment to Petitioner must be carried out. (Apx. 45).

The case most analogous to this conflict imposed upon Petitioner is *Maness v. Meyers,* 419 U.S. 449 (1975), where this Court voided a state court's holding an attorney in contempt for advising a client to refuse to produce subpoenaed material on the ground of self-incrimination. The problem where was compliance would have caused irreparable injury because production of the documents would have caused the damage that could not thereafter be elim-

inated. 419 U.S. at 460. Petitioner herein is faced with the same double edged sword; for he is on the one hand required to comply with the Court's Order of Suspension and indeed withdrew from the practice of law, notified his clients, and notified all of the courts to which he was admitted; and on the other hand, the state court said that he guessed wrong in doing all of that although it was in compliance with that Court's Order and that Court's agent, the Director employed to enforce the Court Order. Constitutional law is not designed to allow such an impossible choice and place it solely on the lawyer who is caught in the cross switches of conflict between a State Supreme Court and its own Director of ethics enforcement. Thus, Petitioner was deprived of his right to due process of law in violation of the Constitution of the United States.

IV.

THE STATE SUPREME COURT'S ERRONEOUS INTERPRETATION OF ITS OWN RULES WARRANTS THIS COURT'S REVIEW.

(Question No. 4)

This Court has jurisdiction to review the Order vacating Petitioner's Order of Suspension and remanding for a full hearing on possible disbarment. The Court should review this as a final order that is collateral to the merits and conclusive on the issues involved.

This Court has long interpreted State Court rules to determine whether a state court had jurisdiction to vacate an earlier order. In *Phillips v. Negley*, 117 U.S. 665 (1886), the defendant was held liable on a default and then moved for an order in the Supreme Court of the District of Colum-

bia to vacate the judgment. That motion was granted, and a new trial was ordered. Several months later, there was a motion to dismiss the appeal, and the Court in general term then ordered the appeal to be dismissed. Relief was sought in this Court, and it was granted. The Court through the opinion of Justice Matthews reviewed inherent power of courts to set aside orders during the same term, a common law principle of many centuries. The court reversed the matter and held that the state court had erroneously applied rules allowing for a vacating of an order.

Interlocutory appeal on a collateral basis is supported not only by the double jeopardy interlocutory review allowed in *Abney v. United States*, 431 U.S. 651 (1977) but also predicated upon the basic civil case of *Cohen v. Beneficial Industrial Loan*, 337 U.S. 541 (1949). *Abney*, on the basis of *Cohen*, held that an order rejecting a double jeopardy claim is a final rejection of that accused's attempt to avoid trial and that retrial is barred by the Fifth Amendment. The order was collateral to and separable from the principal issues involved in the pending criminal trial, when the accused was contesting the very authority of the Government to bring him into court on the charges. 431 U.S. at 659-660. That is the specific issue in the present case, where Petitioner asserts that the State Supreme Court by its own rules is barred from forcing Petitioner into further discipline proceedings. See this Court's opinion on another double jeopardy review by certiorari, *Smalis v. Pennsylvania*, —U.S.—, 106 S. Ct. 1745 (1986), where the court pointed out that the state court's characterization of the matter involved in determining whether double jeopardy applied did not bind this Court; and the review was allowed under 28 U.S.C. Section 1257(c). 106 S.Ct. at 1748. This Court

reviewed a state court decision in *Taylor v. Kentucky*, 436 U.S. 478 (1978), although the state court there had remanded for sentencing; and the court reviewed instructions on the criminal case although it patently appeared that the matter could have been followed up with a subsequent appeal to the State Supreme Court for consideration by this Court. That would not have changed the crystallized federal issues presented in that case. This is made more clear by the point established by then Associate Justice Rehnquist in *Calder v. Jones*, —U.S.—, 104 S.Ct. 1482 (1984), where the Court said,

> Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court 'is plainly final on the federal issue and is not subject to further review in the state courts.' *** Accordingly, as in several past cases presenting jurisdictional issues in this posture, 'we conclude that the judgment below is final within the meaning of (28 U.S.C.) Section 1257.' — U.S. —, 104 S.Ct. at 1486.

The posture of the present case is identical to the issue in *Calder v. Jones;* for here, the State Supreme Court has made its definitive ruling and applied inapplicable and irrelevant state court rules to justify its ruling. There is no other court that can give a remedy in the pending proceeding. The Court's orders of October 6 and November 6, 1986 are therefore final, entered without justification, collateral to the issue of whether Petitioner ought to be suspended for a greater period of time or disbarred, or not guilty at all; and therefore this Court has jurisdiction to review the orders which violated Petitioner's constitutional right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

The State Supreme Court issued an Order suspending Petitioner, and he accepted that suspension and made a good faith effort to carry it out. The Director enforced that suspension with Draconian zeal. The existing rules by their clear and unmistakable terms precluded any rescission of the Order of Suspension. The State Supreme Court then created a whole new interpretation of manifestly inapplicable rules to justify its remanding this matter for consideration of greater discipline. The fashioning of novel rules to effect discipline on an attorney has been looked at with disfavor by this Court. Although the attorney's argument was not accepted, this Court in *Konigsberg v. State Bar of California*, 366 U.S. 36, 47 (1961) made a point that in that case there was no suggestion that the State Supreme Court there fashioned "* * * a special procedural rule for the purposes of this particular case." The implication clearly is that if that were established, this Court may look very closely at the constitutional justification for such *ad hod* judicial legislation. This present case is the unique case which suspends constitutional rights by denying an attorney the protections of finality when he follows the rigorous enforcement of a final order to his substantial detriment. This Court ought not to countenance such a flagrant violation of this Petitioner's right to due process of law as guaranteed by the United States Constitution.

The Court should accept this matter for review and issue the appropriate writ to the State Supreme Court to protect Petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

CX-86-343

Supreme Court

Per Curiam
Dissenting, Kelley & Wahl, JJ.
Took no part, Coyne, J.

In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota.

Filed August 1, 1986
Wayne Tschimperle
Clerk of Appellate Courts

SYLLABUS

Acting on respondent attorney's conditional admission, the court imposes a discipline of 1 year's suspension, 3 years' probation, and certain financial repayments.

Heard, considered, and decided by the court en banc.

OPINION

PER CURIAM.

This matter involves disciplinary sanctions to be imposed on the respondent attorney. For the reasons hereinafter set out, we impose 1 year's suspension, 3 years' probation, and certain financial repayments.

It is necessary first to state the somewhat unusual procedural posture of this proceeding. On January 31, 1986, the Director of the Board of Lawyers Professional Responsibility filed a petition with the court for disciplinary action against respondent Norman Perl. On February 27, 1986, Perl filed his answer to the petition denying the allegations of misconduct and alleging various affirmative defenses. The answer contained a "conditional admission" pursuant to Rules 10(b) and 13(b) of the Rules on Lawyers Professional Responsibility,[1] under which the Director's charges, with some qualification, were admitted, conditioned on a disciplinary disposition of a public reprimand and probation. Thereafter, on April 10, 1986, this court made its order appointing Judge Carroll Larson as referee. The hearing was scheduled to begin July 15, 1986.

On July 9, 1986, by letter to this court and on file, respondent submitted a new, amended conditional admission. He withdrew his answer in its entirety, conditioned on a discipline to be imposed of not more than 1 year's suspension and certain other terms, including refund of certain interest on trust accounts and payment toward the expenses incurred by the Director. The Director responded that while the terms of the conditional admission were not "wholly unreasonable," he could not recommend the tendered disposi-

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[1]Rule 10(b) of the Rules on Lawyers Professional Resopnsibility provides:

> (b) Admission or tender of conditional admission. If the lawyer admits some or all charges, or tenders an admission of some or all charges conditioned upon a stated disposition, the Director may dispense with some or all procedures under Rule 9 and file a petition for disciplinary action together with the lawyer's admission or tender of conditional admission. This Court may act thereon with or without any of the procedures under Rules 12, 13 or 14. If this Court rejects a tender of conditional admission, the matter may be remanded for proceedings under Rule 9.

Rule 13(b) provides:

> (b) Conditional admission. The answer may tender an admission of some or all accusations conditioned upon a stated disposition.

tion. The Director stated, "My view is that if the facts as alleged are found by the referee or admitted, conditionally or otherwise, the appropriate discipline would be substantially more severe than a one year suspension." The Director stated he was ready to proceed with the hearing "or in whatever fashion the Court may find appropriate."

The Rules of Lawyers Professional Responsibility expressly provide for a conditional admission and tender of proposed disposition. *See* footnote 1. The rules are less clear on how an admission is to be handled procedurally. It appears the rules contemplate the court may act thereon "with or without any of the procedures under Rules 12, 13, or 14." *See* Rule 10(b). In other words, the court may act on the conditional admission without the necessity of a hearing before the referee. We deem respondent's letter of July 9, 1986, asking for the court's consideration of his conditional admission, to be a motion directed to this court asking the court to consider respondent's proposal at this time.

If the Director agrees with a conditional admission, ordinarily the Director and the respondent attorney enter into a stipulation, which is then presented to this court for acceptance or rejection. *See, e.g., In re Appert,* 363 N.W.2d 301 (Minn. 1985). But here we do not have a stipulation. The Director disagrees with the tendered disposition. In the absence of a stipulation, we believe the matter, ordinarily, should go to the referee. The referee will treat the conditional admission the same as any pleading. The referee may determine to recommend to this court the tendered disciplinary disposition on the basis of the conditional admission, thus obviating the need for an evidentiary hearing. Or the referee may simply take the conditional admission under advisement and proceed with the hearing, defer-

ring any recommendation until the matter has been fully heard. This procedure preserves the referee's role as this court's factfinder and also enables us to have the benefit of the referee's recommendation. The conditional admission was not designed to afford a means to bypass the referee.

Ordinarily, in keeping with this procedure, we would simply remand respondent Perl's motion to the referee. Because of unique circumstances, however, we have had the matter fully argued before us, and we have concluded to act on the motion here. This proceeding is unique because this court is already quite conversant with the facts and circumstances, more so than a referee would be at this juncture. Respondent Perl's involvement in the Dalkon Shield matters has been the subject of protracted litigation for about seven years, and his involvement has been before us, in various aspects, some five times in the last four years. *See Rice v. Perl,* 320 N.W.2d 407 (Minn. 1982); *Perl v. St. Paul Fire & Marine Insurance Co.,* 345 N.W.2d 209 (Minn. 1984); *In re N.P.,* 361 N.W.2d 386 (Minn. 1985); and *Gilchrist v. Perl* and *Klein v. Perl,* 387 N.W.2d 412 (Minn. 1986) (consolidated on appeal); *see also Browne v. Aetna Casualty & Surety Co.,* 377 N.W.2d 74 (Minn. Ct. App. 1985). A referee's hearing would be long and costly, and, at oral argument, the Director agreed the hearing would not materially add to our understanding of the case. As a result of the highly publicized litigation including also respondent's criminal trial in federal district court, the bar and the public generally are not unaware of at least the broad outline of the nature and extent of the misconduct involved. Moreover, the ultimate responsibility for attorney discipline rests with this court. *In re Daly,* 291 Minn 488, 490, 189 N.W.2d 176, 179 (1971). We conclude, therefore,

under these peculiar circumstances, we should deal with the motion now before us without a remand to the referee. (We have stayed the referee's hearing pending disposition of this motion.)

I.

Attached to this opinion as an appendix is the Director's petition for discipline. Respondent having withdrawn his answer, the allegations in the petition are deemed admitted. *See* Rule 13(c).

Under Count I, respondent admits to a practice of having the nonlawyer employees of his law firm recommend clients to him and paying the employees for such referrals and, indeed, sharing his legal fees with the employees. Employee Robert Olson was paid at least $47,393.98 in referral fees in 1978-79, and Olson obtained another $35,000 to $40,000 from the law firm in 1984 in settlement of his claim for additional referral fees. Under Count II, respondent encouraged, ratified, and paid for solicitation of clients by three other persons, Margaret Hartman, Richard M. Theno, and Jerome R. Johnson.

Under Count III, respondent admits that between 1976 and 1980 he settled approximately 174 Dalkon Shield claims against Aetna Insurance Company. These settlements were negotiated with Willard F. Browne, an Aetna claims representative, who also was being employed by respondent's law firm. Respondent's law firm paid Browne $42,616 during this same period of time and falsely made these payments appear on the law firm books as payment for consultant work on non-Dalkon Shield cases. Respondent breached his duty to his Dalkon Shield clients by not disclosing to them his working relationship with Browne. *See Rice v. Perl,*

320 N.W.2d 407, 411 (Minn. 1982). Pending at this time is a class action brought on behalf of approximately 100 of respondent's Dalkon Shield clients against respondent to recover their attorney fees. *See Klein v. Perl* and *Gilchrist v. Perl,* 387 N.W.2d 412 (Minn. 1986).

Under Count IV, respondent admits that from 1975 to 1980, his firm, at his direction, earned substantial sums of interest on client funds held in the law firm's trust accounts, retaining this income for the firm. Under Count V, respondent admits to commingling client and law firm funds and failure to maintain proper books and records. Under Count VI, respondent admits that upon receiving an investigative inquiry from the Hennepin County Ethics Committee about a complaint of solicitation made by Dr. Robert L. Sellers, respondent falsely denied the solicitation and took active measures to cover up the solicitation activities.

II.

These are serious offenses. They sadly illustrate, as the Director observes, the corrosive effect of rampant commercialism on professional standards. The Director takes the position that suspension is an appropriate sanction, but argues the suspension should be for more than 1 year. Respondent, admitting his misconduct and its seriousness, contends there are extenuating circumstances warranting suspension for not more than 1 year.

Respondent was admitted to the bar in 1949 and is now 61 years old. Until his current problems, he had enjoyed an excellent reputation as a prominent member of the trial bar and had contributed his services generously in numerous civic, professional, religious, and charitable projects. He

cites his acquittal on the federal criminal charges for mail fraud, which included some of the same charges involved here, and while he concedes the acquittal is not res judicata in these disciplinary proceedings, he urges it as an ameliorating factor. In particular, he suggests that some 7 years of protracted litigation—highly publicized, humiliating, and embarrassing—has been a form of punishment. His personal and professional reputation has suffered grievously. His health has been adversely affected. Substantial sums received in fees in the Dalkon Shield cases have been or will be forfeited. Heavy legal fees for his defense have been incurred, and his inability to practice on any sustained and undistracted basis during these past years has resulted in a substantial loss of income.

We have said before that no two disciplinary cases are exactly alike. *In re Serstock,* 316 N.W.2d 559, 561 (Minn. 1982). Each case has its unique circumstances. In two prior cases dealing with solicitation of Dalkon Shield clients by nonlawyer employees, for example, we approved stipulations for a 2-year suspension in one case and a 6-month suspension in the other. *See In re Pyle,* 363 N.W.2d 303 (Minn. 1985) (2 years); *In re Appert,* 363 N.W.2d 301 (Minn. 1985) (6 months). Neither case, however, involved fee forfeitures nor a criminal acquittal nor attorneys approaching the end of their legal careers. In administering discipline, the court weighs the nature of the misconduct, the cumulative weight of the disciplinary rule violations, the harm to the public, and the harm to the legal profession. *In re Pearson,* 353 N.W.2d 415, 419 (Minn 1984). Also weighed in the balance are any extenuating circumstances. *In re Olkon,* 324 N.W.2d (Minn. 1982).

While ordinarily we would agree with the Director that a longer suspension should be imposed, we believe in this instance a 1-year suspension is justifiable. While the Dalkon Shield settlements were tainted by respondent's failure to disclose to his clients Browne's dual role, no claim is made the settlements themselves were not reasonable. Respondent is being subjected to a substantial forfeiture of fees earned on these settlements, a forfeiture which is both "reparational and admonitory." *Gilchrist v. Perl,* 387 N.W.2d 412, 416 (Minn. 1986) (the potenial forfeiture exposure is in excess of $500,000). While respondent's use of client funds to earn interest may be characterized as misappropriation, we have no charge here of conversion or embezzlement in the classic sense. Although the IOLTA program was not established until July 1, 1983, under the tendered disposition respondent will have to refund interest earned on the settlements and will have to reimburse the Director in some substantial degree for the Director's considerable expenses incurred in this disciplinary proceeding. Respondent's argument that the notoriety attending his problems is itself punishment is double edged. Notoriety is often a function of prominence, and the latter cannot be accepted without the former. *In re Franke,* 345 N.W.2d 224, 229 (Minn. 1984), we observed that negative media attention reflects adversely on all members of the profession and may discourage those needing legal assistance from seeking it. On the other hand, the public is aware here of respondent's acquittal on the criminal charges, and, undeniably, the overall publicity has been punishment. But more importantly, respondent is not indifferent to the harm he has caused. We are persuaded there will be no reoccurrence of this misconduct by respondent. His otherwise good record over many years and his contriteness so vouch. Taking all these factors into consideration

and having in mind respondent's age, together with the other conditions we here impose, we believe a 1-year suspension is appropriate.

It is, therefore, ordered that respondent Norman Perl is hereby suspended from the practice of law for a period of 1 year, commencing August 4, 1986. He can be reinstated upon petition on August 4, 1987, if the following terms and conditions are met:

1. Respondent shall pay a reasonable sum toward reimbursement of the Director's expenses, costs, and disbursements in this proceeding. Within 15 days from the date of this opinion, the parties shall submit to this court the sum agreed upon and the terms of payment. If they are unable to agree, within the same 15 days each party shall submit in affidavit form their position on this issue for the court's decision.

2. Respondent and his law firm shall, under the Director's supervision, promptly refund the interest earned on any funds belonging to clients as set out in Count IV of the Director's petition. This money shall be paid to the clients to whom it is owed, to the extent practically ascertainable and feasible, otherwise to the Interest on Lawyers Trust Account Board (IOLTA). The Director may designate an accountant to implement this accounting and refund procedure, the cost thereof to be paid by respondent.

3. Respondent shall proceed promptly with efforts towards settlement of the pending claims of the Dalkon Shield clients in *Gilchrist* and the *Klein* class action.

4. Respondent and his law firm shall demonstrate compliance with all requirements for the keeping of law office

books and records, including but not limited to trust accounts.

5. At or before the end of the 1-year suspension, and prior to reinstatement:

a) Respondent shall satisfy the Director that the *Gilchrist Klein* cases have either been settled or that good-faith efforts to do so are being diligently pursued. As this court has previously noted, a disciplinary proceeding is not primarily a collection action. *In re Peters,* 332 N.W.2d 10 (Minn. 1983). We would expect, however, these claims to be resolved as promptly as possible, and failure to have done so prior to reinstatement, particularly in view of assurances given by respondent's counsel, will be carefully scrutinized.

b) Respondent shall take and pass the Professional Responsibility Examination.

c) Respondent shall meet the requirements of the Minnesota Board of Continuing Legal Education for reinstatement.

6. Upon reinstatement, respondent shall be placed on 3 years' supervised probation and shall perform a reasonable number of hours of pro bono legal service as the Director specifies for such persons or through such agencies as the Director designates.

KELLEY, Justice, dissents in opinion to follow, in which WAHL, Justice, joins.

COYNE, Justice, took no part in the consideration or decision of this case.

APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

FILE NO.————

In Re Petition for Disciplinary Action against NORMAN PERL, Attorney at Law.

PETITION FOR DISCIPLINARY ACTION

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of Lawyers Professional Responsibility (Director) files this petition, upon the parties' agreement filed herewith, pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility (RLPR). The Director alleges:

The above-named attorney (respondent) is, and has been since December 5, 1949, admitted to practice law in Minnesota. Respondent has paid through June 30, 1986, the registration fee required by Rule 2, Rules for Registration of Attorneys. Respondent currently practices law in Minneapolis, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

COUNT I

Payment of Referral Fees and Fee-Splitting

A. At all relevant times respondent was a shareholder of DeParcq, Anderson, Perl & Hunegs, P.A. (law firm), a

Minnesota professional corporation. From 1975 through 1980 respondent was a 50 percent shareholder and managing partner.

B. In years including 1978 and 1979, with respondent's knowledge and at his direction, fees were paid by the law firm to several of the law firm's non-lawyer employees, for having referred and recommended prospective clients' employment of the law firm. At certain times such referral fees were paid as a percentage of legal fees received by the law firm.

C. Respondent requested law firm employees to recommend to prospective clients that they employ him and the law firm as a private practitioner. Several employees did so.

D. Respondent accepted employment representing clients when he knew or it was obvious that the clients in certain cases sought his services as a result of having such services recommended to them by law firm employees.

E. Among the law firm non-lawyer employees receiving referral fees from the law firm were Helen Carciofini, Patricia Johnson Frobard, Jerome R. Johnson, Robert Olson, Mary Quirk and A. Gail Server.

F. At respondent's direction and by checks signed by respondent, Robert Olson received at least $47,393.98 in fees from the law firm in 1978-9 for having referred clients to the law firm.

G. In addition to the referral fees paid Olson in 1978 and 1979, Olson obtained approximately $35,000 to $40,000 from the law firm in settlemen of a civil acion brought by Olson against the law firm in 1984 for referral fees due Olson from the law firm.

H. The law firm may have discontinued at some point the practice of paying non-lawyer employees referral fees calculated on an exact percentage basis at the time the fees were received. However, at respondent's direction the law firm continued to compensate non-lawyer employees for referrals by payment of bonuses a various times.

I. Respondent's request that law firm employees recommend him or the law firm to others for employment, his payments to non-lawyer employees for these recommendations, his acceptance of employment as a result of these recommendations and his sharing of legal fees with non-lawyer employees violated the disciplinary rules, including but not necessarily limited to DR 1-102(a)(2), DR 2-103(B), (C) and (E), (renumbered DR 2-103(A)(2), (3), and (4) on June 1, 1980), DR 2-103(D) (effective through May 31, 1980) and DR 3-102(A), Minnesota Code of Professional Responsibility (MCPR).

COUNT II

Solicitation of Clients

A. Count I is realleged.

B. Respondent encouraged, ratified, paid for, and benefitted by the solicitation of clients.

C. In or about late 1978, Orville Heil, an employee of the law firm, with respondent's knowledge and consent, hired client Margaret Hartman to obtain names of, make preliminary contact with, and solicit for the law firm clients in the Duluth-Superior area.

D. In the next few months Hartman successfully solicited for the law firm numerous clients who had claims

against the A. H. Robins Company, the manufacturer and distributor of the Dalkon Shield, and its insurer, the Aetna Insurance Company.

E. Hartman was paid by the law firm $1,850 for referrals and claimed an additional $600 was owed her for other clients referred by her to the law firm.

F. Respondent and his law firm benefited by the Hartman solicitation and subsequent settlement of the cases by receiving over $100,000 in attorney's fees.

G. In or about December, 1975, Richard M. Theno, an employee of the law firm, solicited and retained for the law firm as clients, Edwin J. Stitch and Arlyce Plafcan who had claims for personal injury against an insured of the Aetna Insurance Company.

H. In April, 1976, respondent settled the claim of Stitch and Plafcan with Willard F. Browne, an Aetna adjuster, and the law firm received over $38,000 in attorney's fees.

I. In 1977 and 1978 Jerome R. Johnson, an employee of the law firm, paid a client of the law firm $60 for the referral of three clients to the law firm. During the same period he also paid another client of the law firm $100 for the referral of four other clients to the law firm. Respondent and the law firm benefited by these solicitations and the subsequent settlement of the cases by receiving attorney's fees.

J. Respondent's encouragement and ratification of the solicitation of clients and acceptance of employment by clients known to be solicited violates the disciplinary rules,

including but not necessarily limited to DR 1-102(A) (2), DR 2-103(B), (C) and (E) (renumbered DR 2-103(A)-(2), (3) and (4) on June 1, 1980), DR 2-103(D) (effective through May 31, 1980) and DR 3-102(A), MCPR.

COUNT III

Improper Relationship With Insurance Adjuster and Failure to Disclose Relationship to Clients

A. Counts I and II are realleged.

B. Willard F. Browne was employed full-time as a senior claims representative for Aetna Insurance Co. for 35 years, until he was terminated by Aetna on November 15, 1979.

C. Brown handled more Dalkon Shield claims than any other Aetna claims representative in the United States, and as an Aetna employee and claims representative was privy to confidential information and legal opinions regarding the defense of Dalkon Shield cases, having attended or received information on national defense strategy meetings.

D. Between 1976 and 1980, respondent represented clients with claims against Aetna insureds including approximately 300 Dalkon Shield claims against Aetna, 174 of which were settled with Browne.

E. Between 1976 and November 15, 1979, the law firm paid Browne the following sums while he was employed by Aetna:

1976	$ 7,505.00
1977	2,500.00
1978	11,115.00
1979	21,496.00
TOTAL	$42,616.00

F. Respondent falsely made all payments to Browne appear on law firm books and records as payments for consultant work done on Federal Employees Liability Act (FELA) cases although Browne did no significant or substantial work on FELA cases or any other cases for the law firm during 1976 to 1979.

G. Respondent did not disclose to his clients with claims against Aetna insureds the existence of any ongoing financial or working relationship he had with Brown while Browne was settling claims for Aetna.

H. In 1980 Cecelia Rice, a former client of respondent, sued respondent and the law firm to recover attorney's fees paid the law firm based on respondent's improper relationship with Browne and his failure to disclose the relationship to Rice. In 1982 the Minnesota Supreme Court held respondent's failure to disclose the respondent-Browne relationship was a breach of respondent's fiduciary duty to his client Rice. *See Rice v. Perl, Browne and Aetna*, 320 N.W.2d 407, 411 (Minn. 1982).

I. In September, 1983, Patricia Klein, on behalf of herself and other former clients of respondent, initiated a class action suit to recover attorney's fees paid the law firm based upon respondent's failure to disclose his relationship with Browne. In January, 1985, the Hennepin County District Court awarded the class, approximately 100 in number, the

return of their attorney's fees paid the respondent, with interest. In August, 1985, the court awarded additional class members the return of their attorney's fees paid respondent plus interest and awarded class counsel over $126,000 in attorney's fees and costs. The award to the class is over $1 million. This matter is on appeal.

J. In February, 1984, Susan Gilchrist, a former client of respondent, sued respondent and the law firm to recover attorney's fees paid the law firm based on respondent's failure to disclose his relationship with Browne. In November, 1984, the Hennepin County District Court denied Gilchrist's motion for summary judgment on the return of attorney's fees. In March, 1985, the Court of Appeals held that the trial court improperly denied summary judgment and certified the matter to the supreme court for review. *Klein* and *Gilchrist* are consolidated for hearing before the Minnesota Supreme Court.

K. Respondent's payment of monies to Browne and acceptance of attorney fees from clients with Dalkon Shield claims while Browne was an Aetna adjuster and negotiating Dalkon Shield claims with respondent violated the disciplinary rules including, but not necessarily limited to DR 1-102(A)(2), DR 2-106, DR 5-101(A) and DR 7-101-(A)(3), MCPR.

L. Respondent's failure to disclose to his clients with claims against Aetna insureds his relationship with Browne, in breach of his fiduciary duty to his clients, violated the disciplinary rules including, but not necessarily limited to DR 1-102(A)(5), DR 1-102(A)(6) and DR 7-101(A)-(3), MCPR.

COUNT IV

Misappropriation of Client Funds

A. Count I paragraph A is realleged.

B. Respondent during the period 1975 to 1980 directed and controlled the law firm's bookkeeping department regarding disbursements and investments of law firm and client funds, and maintenance of the financial records of the law firm and all other financial matters of the law firm.

C. During the period 1975 to 1979 the law firm, with respondent's knowledge and consent, and at his direction, invested hundreds of thousands of dollars from both the business checking account and the trust checking account in a single interest-bearing savings account. Client monies were not held in trust while in this account.

D. During this period approximately $20,000 was earned in interest on the savings account. All interest earned, including that earned on client funds, was retained by the law firm.

E. From 1975 through at least 1980, the law firm, with respondent's knowledge and consent, and at his direction, invested millions of dollars from the trust account in repurchase agreements and certificates of deposit undesignated as to particular clients. During at least a portion of this period the investments consisted of both trust account and general account funds.

F. From 1975 through 1980, in excess of $28,000 was earned in interest on these investments. All interest earned, including that earned on client funds, was retained by the law firm.

G. No clients had knowledge of or consented to either these investments or the earning of interest on the savings account with client funds.

H. Although the law firm earned interest on client funds at least since 1975, respondent and the law firm have failed to make any accounting or pay any interest to the clients.

I. Respondent's transfer of monies from the trust checking account into a non-trust savings account and investments, failure to pay clients interest earned on client monies in the savings account and the investments, and retention of all interest earned on trust monies in the savings account and the investments constitutes continuing misappropriation of client monies in violation of the disciplinary rules including but not necessarily limited to DR 7-101(A)(3) and DR 9-102(A), MCPR, and Rule 1.15(a), Minnesota Rules of Professional Conduct (effective August 31, 1985).

COUNT V

Commingling of Client and Law Firm Funds and Inadequate Books and Records

A. Count IV paragraphs A-H are realleged.

B. During the period form 1975 to 1979 the law firm commingled funds from its general checking account and its trust checking account in a single savings account, thereby depositing law firm funds together with client funds in a single account.

C. During the period 1975 to 1980, the law firm regularly left law firm monies earned, after settlement, in the trust account after distribution of settlement proceeds.

D. Due to the failure of the law firm to remove earned fees from the trust account, investments from the trust account included both client and law firm monies in a single investment.

E. On at least two occasions in 1979 the law firm transferred thousands of dollars from the general checking account into the trust checking account.

F. Respondent and his law firm were required to maintain books and records which would clearly identify all client monies to be held in trust, and to monthly reconcile those books and records with the bank's records and the trust checking account records. *See* Opinion No. 9 of the Lawyers Professional Responsibility Board, September 10, 1976.

G. During the period October 1, 1976, through at least 1980, the books and records maintained by the law firm did not identify client monies to be held in trust.

H. During the period of 1977 through 1980 the law firm did not monthly reconcile the client cash balance in the trust account with the bank statements or with the checking account or trust journal.

I. The deposit of law firm monies and trust monies into a single law firm savings account, the joint investment of law firm monies and trust monies in a single investment, the deposit of law firm monies into the trust account and the failure to remove attorney's fees earned from the trust account constituted the commingling of law firm and client monies and violated the disciplinary rules including, but not necessarily limited to DR 9-102, MCPR.

J. Respondent's failure to maintain proper books and records to determine the amount of client monies to be held in trust violated the disciplinary rules including, but not necessarily limited to DR 9-102(B)(3) and DR 9-103 (renumbered DR 9-104 July, 1983), MCPR, and Opinion No. 9 of the Lawyers Professional Responsibility Board (effective September 10, 1976).

COUNT VI

Cover-up of Misconduct and Obstruction of Disciplinary Investigation

A. Counts I through III are realleged.

B. On or about March 7, 1979, Robert L. Sellers, M.D., of Superior, Wisconsin, filed a complaint with the Director alleging the improper solicitation of his patients by respondent's law firm.

C. In a May 8, 1979, response to an investigative inquiry of the Dr. Sellers complaint by the Hennepin County Ethics Committee respondent, knowing that Heil and Hartman had solicited clients, and that Hartman had been paid for solicitation, falsely stated:

> Our investigation reveals there has been no solicitation; no payment or promise of payment for the names of women with Dalkon Shields.
>
> The initial contact by potential clients, from what we have been able to learn through our investigation, was at the initiative of the client.

D. Upon learning of Sellers' letter, respondent ordered and caused the alteration of law firm books, records, and

documents for the purpose of covering up the payment of solicitation fees to Hartman and obstruction of the disciplinary investigation. He instructed the law firm bookkeeper to alter the general journal and client expense sheets so that referral fees paid to Hartman and recorded as expenses to be changed to clients instead were made to appear as loans to Hartman.

E. Upon learning of Sellers' letter, respondent instructed Heil to obtain from Hartman all law firm brochures, forms, and authorizations that Heil had furnished to Hartman for her use in solicitation of clients for the law firm. Heil obtained most of the materials.

F. Upon learning of Sellers' letter, respondent instructed Stephen Eckman, an associate attorney with the law firm, to go to the Duluth-Superior area to contact certain Dalkon Shield clients and obtain from each of them a false statement that they had not been solicited. When Eckman refused, other employees contacted these clients for similar purposes, pursuant to instructions from respondent.

G. Respondent's efforts to obstruct the disciplinary investigation violated the disciplinary rules, including but not necessarily limited to DR 1-102(A)(2), (4), (5) and (6), MCPR.

WHEREFORE, the Director respectfully prays for an order of this court disbarring respondent or imposing otherwise appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: January 31, 1986.

/s/WILLIAM J. WERNZ
WILLIAM J. WERNZ
DIRECTOR OF LAWYERS
PROFESSIONAL
RESPONSIBILITY
Attorney No. 11599X
444 Lafayette Road, 4th Floor
St. Paul, MN 55101
(612) 296-3952

STATE OF MINNESOTA
IN SUPREME COURT

CX-86-343

In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota.

ORDER

Pursuant to the court's opinion of August 1, 1986, the parties have submitted affidavits setting out their respective positions on the amount of costs and expenses respondent should be required to reimburse the Director. Further, the Director has petitioned for a rehearing of the entire case on its merits, and the Lawyers Board of Professional Responsibility has independently moved for leave to file an amicus brief.

At the time this court considered respondent's motion for a 1-year suspension on a conditional admission, the court was under the impression that respondent's tendered dis-

position was considered to be not "wholly unreasonable," and that the parties were essentially in agreement on the amount of costs and expenses to be reimbursed. It now appears, however, from the submitted affidavits that the parties are more than $200,000 apart on the reimbursement item. Not only is the court not in a position to resolve this disparity, but the Director has filed further information, including a detailed procedural history, which leads us to believe we were not fully apprised of all the facts and circumstances at the time of our decision.

After a careful review, we conclude fairness and maintenance of the integrity of the judicial system require that we grant the Director's petition. Our opinion and order of August 1, 1986, is withdrawn and vacated. The Board's motion to appear as amicus being now moot, is denied.

IT IS, THEREFORE, NOW ORDERED that this matter is remanded to the referee, Judge Carroll Larson, for a hearing.

Dated: October 6, 1986.

BY THE COURT:
/s/DOUGLAS K. AMDAHL
Chief Justice

SCOTT, Justice (dissenting)

I cannot agree that it is necessary to take the unprecedented action of withdrawing our opinion filed August 1, 1986. The respondent is now suspended by that decision. The text clearly states that he can be reinstated only if certain terms and conditions are met, among them that:

> Respondent shall pay a reasonable sum toward reimbursement of the Director's expenses, costs, and disbursements in this proceeding. Within 15 days from the date of this opinion, the parties shall submit to this court the sum agreed upon and the terms of payment. If they are unable to agree, within the same 15 days each party shall submit in affidavit form their position on this issue for the court's decision.

It was therefore contemplated that we might be called upon to set the amount. There seems no reason why we cannot take such action at this time.

The only other reason for withdrawing our opinion would be to impose a greater sanction. We stated in the opinion that:

> We are persuaded there will be no reoccurence of this misconduct by respondent. His otherwise good record over many years and his contriteness so vouch. Taking all these factors into consideration and having in mind respondent's age, together with the other conditions we here impose, we believe a 1-year suspension is appropriate.

As the opinion indicates, this matter has been thoroughly aired. We should not have second thoughts merely because we have the power to impose a greater sanction. We should only take a more severe stance if justice calls for it. The opinion properly evaluates the complicated procedure involved and arrives at a properly balanced conclusion. I would not withdraw it, and therefore dissent.

STATE OF MINNESOTA
IN SUPREME COURT

CX-86-343

In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota.

ORDER

Respondent has filed a motion for reconsideration and petition for rehearing, asking that this court's order of October 6, 1986, be vacated and that this court's opinion and order of August 1, 1986, be reinstated. Being fully advised in the premises,

IT IS ORDERED:

Respondent's motion for reconsideration and petition for rehearing are, in all respects, denied.

Dated: November 6, 1986.

BY THE COURT:
/s/DOUGLAS K. AMDAHL
Chief Justice

MEMORANDUM

On August 1, 1986, the court issued an opinion and order suspending respondent for 1 year commencing August 4, 1986, with reinstatement dependent on certain terms and conditions. Two justices dissented with their opinion to follow. On August 5, 1986, the Director filed, pursuant to Minn. R. Civ. App. P. 140, a petition for rehearing, to

which respondent filed an answering brief. Both parties also submitted affidavits on the matter of costs and expenses to be reimbursed by respondent. On October 6, 1986, the court granted the petition for rehearing by vacating its suspension order, withdrawing its opinion of August 1, 1986, and remanding the matter to the referee for a hearing.

Respondent now asserts that the court was without power to vacate its suspension order; that grounds for granting a rehearing were, in any event, lacking; that respondent has been denied due process; and that "principles of *res judicata*, collateral estoppel and law of the case and mootness" prohibit vacation of the original suspension order and remand for a referee's hearing. These contentions are without merit.

This court has authority to reconsider its rulings in disciplinary matters, both under its inherent powers and under Minn. R. Civ. App. P. 140, and has had an established practice of doing so. *See, e.g., In re Tracy,* 197 Minn. 35, 26 N.W. 142 (1936); *In re McDonald,* 204 Minn. 61, 282 N.W.2d 677 (1938). In fact, respondent has himself twice petitioned for rehearings in these protracted proceedings. Both parties have had ample opportunity to brief the issues, plus oral argument was afforded on respondent's motion for consideration of his conditional admission. The requirements of due process have been more than adequately satisfied.

Respondent argues his "offer" to be suspended for 1 year was "accepted" by the court and, therefore, is a kind of contract or plea bargain, which is binding on this court. The analogy is completely misleading. This case came before the court on respondent's motion for proposed relief, respondent apparently having been unable to reach an agreement with the Director. As explained in its October 6,

1986, order, the court was under the impression that, while the parties had not stipulated to a disposition of the case, the Director thought respondent's overall proposal was not wholly unreasonable, and that the parties had essentially agreed on the conditions for any suspension, including reimbursement expenses, a major item involving over a quarter of a million dollars. It became clear, however, on reconsideration, that such was not the case.

Although aware a petition for rehearing was pending, respondent neither asserted a right to a stay of suspension under Rule 140.03 nor applied for a stay. Instead, respondent chose to withdraw from the practice of law on the assumption the petition would be denied. Because respondent guessed wrong does not entitle him to claim estoppel, much less res judicata.

SCOTT, Justice, having dissented on the petition for rehearing of October 6, 1986, took no part in this order and memorandum.

COYNE, Justice, took no part in the consideration or decision of this case.

RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

Adopted November 1, 1976
Effective January 1, 1977

* * *

RULE 2. PURPOSE

It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or

unprofessional conduct be promptly investigated and disposed of and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted. Such investigations and proceedings shall be conducted in accordance with these Rules.

* * *

Amended July 22, 1982.

RULE 10. DISPENSING WITH PANEL PROCEEDINGS

(a) Agreement of parties. The parties by written agreement may dispense with some or all procedures under Rule 9 before the Director files a petition under Rule 12.

(b) Admission or tender of conditional admission. If the lawyer admits some or all charges, or tenders an admission of some or all charges conditioned upon a stated disposition, the Director may dispense with some or all procedures under Rule 9 and file a petition for disciplinary action together with the lawyer's admission or tender of conditional admission. This Court may act thereon with or without any of the procedures under Rules 12, 13, or 14. If this Court rejects a tender of conditional admission, the matter may be remanded for proceedings under Rule 9.

* * *

STATE OF MINNESOTA IN SUPREME COURT

ORDER PROMULGATING AMENDMENTS TO THE RULES OF CIVIL APPELLATE PROCEDURE

WHEREAS, the Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure has recommended

certain amendments to the Rules of Civil Appellate Procedure, and

WHEREAS, the Supreme Court held a hearing on the recommended amendments on June 7, 1983, and is fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED, that the annexed amended Rules of Civil Appellate Procedure and the appendix of forms be, and same are prescribed and promulgated for the regulation of practice and procedure in civil matters in the appellate courts of the State of Minnesota. The comments are those of the Advisory Committee and this Court does not pass on their accuracy or reliability.

IT IS FURTHER ORDERED that these amended rules shall govern all appeals taken on or after August 1, 1983. Appeals and other proceedings pending in the Supreme Court on July 31, 1983, will be governed by the former Rules of Civil Appellate Procedure.

IT IS FURTHER ORDERED that, during the transition period from the effective date of these rules, August 1, 1983, to the actual operational establishment of the Court of Appeals, November 1, 1983, the implementation of the following rules will be delayed until November 1, 1983: Rules 105, 120, 121, 127 and 131.02. Those rules, in their present form, will remain effective until that date and the current practices and procedures of the Supreme Court will remain in effect during the period of delayed implementation.

IT IS FURTHER ORDERED that the Advisory Committee continue to serve to monitor said rules and amend-

ments and to hear and accept comments for further changes, to be submitted to the Supreme Court when appropriate.
Dated: June 17, 1983.

BY THE COURT:

/s/DOUGLAS K. AMDAHL
Chief Justice

MINNESOTA RULES OF CIVIL APPELLATE PROCEDURE

Adopted effective February 1, 1968
Revised generally effective August 1, 1983

* * *

TITLE I. APPLICABILITY OF RULES

RULE 101. SCOPE OF RULES; DEFINITIONS

These rules govern procedure in the Supreme Court of Minnesota in civil appeals; in criminal appeals insofar as the rules are not inconsistent with the Rules of Criminal Procedure or Minnesota Statutes; in proceedings for review of orders of administrative agencies, boards or commissions; and on applications for writs or other relief in civil proceedings which the Supreme Court or a justice thereof is competent to give. The term "trial court" as used in these rules shall refer to the court or agency whose decision is sought to be reviewed.

Rule 101.01. Scope

These rules govern procedure in the Supreme Court and the Court of Appeals of Minnesota in civil appeals; in criminal appeals insofar as the rules are not inconsistent with

the Rules of Criminal Procedure; in proceedings for review of orders of administrative agencies, boards or commissions; and on applications for writs or other relief in civil proceedings which the Supreme Court, the Court of Appeals or a justice or judge thereof is competent to give.

STATE OF MINNESOTA
IN SUPREME COURT

CX-86-343

In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota.

PARTIAL TRANSCRIPT OF PROCEEDINGS
AT ORAL ARGUMENT
ON HEARING OF JULY 16, 1986

* * *

MR. NORDBY: If it please the court, I'm Jack Nordby, together with Mr. Ronald Meshbesher representing the Respondent Mr. Perl, who is the moving party here today. As I've indicated, I will take 20 minutes, Mr. Meshbesher ten and we'll reserve five for rebuttal. In response to your specific question, Justice Yetka, on July 9th, we mailed a letter to each member of the court referring to a conditional admission that had been made in respondent's answer. The conditional admission admitted certain facts conditionally upon the court's acceptance of a disposition that would be probationary and would not involve any suspension or disbarment. In the letter, after discussions with Mr. Wernz's office, we expanded that to this extent, we agreed that the conditions of the disposition could include a period of expe

(sic), of suspension of Mr. Perl's license but not to exceed a period of one year and, secondly, that we would, if necessary, withdraw the answer for the limited purpose only of this proceeding and on the understanding that under the code and the law that withdrawal of the answer could not be deemed an admission of any of the facts in the petition for any other purpose that this Court's accepting the conditional admission. The letter, as your honor has pointed out, was not filed. That was an oversight on my part for which I apologize.

* * *

JUSTICE YETKA: Well counsel, before you proceed with oral argument, what I'd like to ask Mr. Wernz several questions, please. The court is in a kind of a difficult procedural posture here. We're not sure whether we have a stipulation or we don't. We have a proposal and we have a response but there is no signed stipulation. Now, you've apparently indicated that this is a good faith settlement offer and not wholly unreasonable but you can't recommend it. Now, what I'd like to ask you is, where does this place the court? Does this stipulation or proposed conditional admission consider all of the charges that were made in your initial petition?

MR. WERNZ: Your honor, it isn't a stipulation. I don't agree to one year as being an appropriate discipline. If the conditional admission intends to conditionally withdraw the answer and thereby admit the allegations of the petition for disciplinary action, of course I join in that aspect of reporting to the court that the facts and conclusions of law are as alleged for the purposes of considering this conditional admission. As far as where it places the court, it is a novel

proceeding. The rule doesn't say, Rule 13(c), exactly how the court shall consider conditional admissions.

* * *

JUSTICE YETKA: Well, does this, do these conditional admissions then, take into consideration all these charges I've indicated that you filed initially. Or, to put it another way, this case has been in federal court in terms of a criminal proceeding, many of the underlying facts of this disciplinary proceedings have been before this court in two civil cases. Now this is the fourth time, in effect, it's before the court. Are there any facts about this case that the court is unaware of that could be brought out in a proceedings before a referee?

MR. WERNZ: Naturally any referee proceedings tends to lend color and shading and dimension to the allegations of the petition. But, if this court takes, as I believe it necessarily must for purposes of considering this matter, the petition for disciplinary action as the facts and the only facts of the matter, then I believe there is a sufficient factual basis for this court to determine what discipline is appropriate. Rule 13(c) provides, by way of illustration, that if a respondent doesn't answer a petition, the court shall proceed to consider the appropriate discipline. The withdrawal of an answer would operate in the same way . . . conditionally, though.

JUSTICE YETKA: So that, in your opinion then, if this matter were to be rejected by the court and sent to a referee, the end result of the referee hearings would be simply a recommendation as to what the proper discipline would be. Upon submitting to that referee the same set of facts that have come out in the criminal case in federal court and the two civil cases in the state court, is that correct?

MR. WERNZ: We would hope to be able to prove the allegations of the petition and hope therefore that the referee's report would embody the same factual allegations as are in the petition. I recognize, however, that the respondent admits them only conditionally and offers in his original answer many explanations and even denials.

JUSTICE YETKA: All right, then. Just one final question. That, in other words, in conclusion, what you're, in effect, saying that the only matter for this court to consider and the only difference that you have with the proposal is the discipline that is proposed. Is that correct?

MR. WERNZ: Yes, so long as it's understood that the facts . . . factual basis is the facts alleged in the petition and that's what is meant by the July 9 letter of Mr. Perl's counsel.

* * *

MR. WERNZ: May it please the court, counsel. I am here at the court's request to tell you why I think the conditional admission involving a one-year suspension is not, on the one hand, wholly unreasonable, and yet, on the other hand, is not the right thing to do. And also, finally, to suggest to you that if the court is minded to involve itself at this stage of the proceedings further, there may be yet some other way of inducing an agreement.

* * *

I would, of course, desire greatly to avoid further litigation myself. To use the resources of my office in the most efficient way and to avoid any unnecessary litigation. It would be expedient from that point of view to accept the conditional admission and one year suspension. Which I agree is not a slap on the wrist. But it is not a matter of expedience that is before the court today, it is what is right

and for the following reasons I suggest to you that the one-year suspension is simply insufficient.

The petition for disciplinary action has six counts. Those counts can be distilled in a couple of ways around themes that show the hallmark of the way Mr. Perl practiced law for a number of years. And those themes have to do with greed and dishonesty, two characteristics of a lawyer which are not compatible with mild discipline. The greed is shown in his systematic subordination of the professional aspect of his practice of law to the commercial aspect. This is the theme of the practice of law in our times to a large degree. The tension between the commercial on the one hand and the professional on the other, and probably nowhere is it more acute than in the plaintiff's personal injury bar. And for that reason, the court has very clearly and firmly set down certain disciplinary rules that all atthorneys know. That attorneys don't solicit clients. Attorneys don't pay their attorneys to be hustling clients. They don't share fees with non lawyer employees.

Mr. Perl, it's now conditionally admitted, violated all of these rules not just once or twice but systematically over a period of years as a standard operating procedure. To refer the court to the first count, paragraphs F and G, taking one so-called investigator from the Perl firm, this is now conditionally admitted, at respondent's direction and by checks signed by respondent, Robert Olson received at least $47,393 in fees from the law firm in 1978 and 1979 for having referred clients to the law firm. Paragraph G — in addition to the referral fees paid Olson in 1978 and 1979, Olson obtained approximately $35,000 to $40,000 from the law firm, and here I paraphrase, in settlement of civil litigation (tape skipped) clients were referred, more than $100,000 in fees were earned. That's all in the petition.

Now, there was a complaint by Dr. Sellers three years before the A. H. Robins Company. Dr. Sellers complained and Mr. Perl wrote in response to the complaint to the Hennepin County District Ethics Committee, this is Count Six, our investigation reveals there has been no solicitation, no payment, or promise of payment for the names of women with Dalkon Shields. The initial contact by potential clients, or of potential clients, from what we have been able to learn was at the initiative of the client. All of that was false and was now admitted to be false.

But the false statements didn't stop there. It's alleged and conditionally admitted that the firm records were altered to hide the payments to Hartman and altered at Mr. Perl's direction. And, finally, in connection with the Hartman matter, Mr. Perl asked his associate, Steven Eckman, to go to Superior and to obtain from solicitees false statements that they weren't solicited. Eckman declined. Others were sent in his place.

And, finally, nothing to do with Margaret Hartman, but everything to do with dishonesty, it's now admitted Count III, paragraph F, with respect to Willard Browne, respondent falsely made all payments to Browne appear on all firm books and records as payments for consultant work done on FELA cases, although Browne did no significant or substantial work on FELA cases or any other cases for the law firm during 1976 to 1979. He paid the insurance adjuster the $42,000 that was alleged and yet the insurance adjuster did no work for the firm and respondent tried to cover up that fact.

On these facts then, those alleged in the petition and conditionally admitted, what discipline is appropriate. I acknowledge it's a difficult question. The case in many ways

is unique and unprecedented. The petition has recommended disbarment. Disbarment because, principally, of the dishonesty. Also of the recalcitrance, as well as the variety of the misconduct. The trust account interest has still not been disgorged by Mr. Perl no matter what he may say about remorse. $45,000 was earned. It's all still in the firm's pocket. None of it's been repaid. And with dishonesty to this very court in connection with the disciplinary petition, the question must be asked, when in the near future could this court confidently hold up through its licenture a man who did such dishonest things to the public as an honest lawyer.

However, as I say, it's a difficult case to size up and evaluate and I would concede that disbarment is not the only reasonable disposition. I would concede that suspension is a reasonable disposition though not the one I recommend. I would not concede that a short suspension of one year is reasonable. I believe that a suspension in the area of three to five years is a reasonable disposition. The reason that I say that three years is, or five years is more appropriate, is that I believe it is commensurate with the misconduct.

* * *

I would also recommend to the court that any discipline it may choose to impose include not just the suspension or disbarment, but a disgorgement of the trust account interest, all of it. There's a great difficulty because of the state of books and records and figuring out to the penny whose principal it was, was it the firm's, was it the clients'. It's difficult to disentangle. There's $45,000 that should all be disgorged, if not to the clients then to IOLTA or some other public board. The lawyers board costs should be reimbursed and the court, I would ask, to be mindful of the

fact that I represent to you now that computed only on $50 an hour for attorneys and $25 an hour for legal assistants, my office has expended well over $200,000 in recorded time, in addition to much time that was never recorded early in the case on this matter and Mr. Perl, I think if he's truly remorseful, should be made to answer to the lawyers of the state of Minnesota for the payment of their registration fees in that manner.

Finally, in conclusion, I would ask the court, and I apologize if I've made any, offered any grounds for mistaking that I somehow thought one year was reasonable. I don't. I ask the court to reject the one-year conditional admission and I indicated at the outset that there may be some other way, depending on the court's disposition to become involved in ongoing matters. The court has, in some cases, presented to it under stipulation where it didn't agree with the stipulation, then indicated to the parties that another particular discipline would be appropriate. It may well provide a way of avoiding the litigation to have the court deny the conditional admission as submitted with some indication of what would be acceptable. I would suggest that would be a powerful inducement to Mr. Perl to put an end to this.

In any event, excepting only a final disposition of this matter, I would ask the court to instruct the referee to promptly commence this matter that had been scheduled to begin trial yesterday and to begin no later than Monday. Thank you.

JUSTICE SCOTT: I think everybody in this court should realize that no one questions, the, your sincerity, your dedication and your good faith in this matter and that of the board. But I think a practical question is, and you admit

that this is kind of a unique case, is to what avail would be two more years of litigation in this case. What more then when you present it to us for final disposition after all that time, what more will we know then than we know now. That's the uniqueness of the case. It's been up here four or five times already in different aspects. The Dalkon Shield situation's been up here and many other courts. It's seemed to plague our whole legal profession nationally and to no one's benefit. So my question is, what if we do go ahead and let Judge Carroll Larson go ahead and hear this thing, what are we, what are we gaining by it? And then, and then a final question for you Mr. Wernz is having, all of us having practiced law and handled the many types of cases and all types of litigation, how do we know, how do we know what the referee may recommend to us? We've always showed great deference to the recommendations of the referee. In other words, are we going to get any different situation before us after two more years of litigation than we have now?

MR. WERNZ: I think, first of all, that it wouldn't be two years for the matter, three or six weeks was referred to there. I think it may be ten or twelve weeks, but it would be a few months. But, to take the question head on, I would like to assume that, in effect, the only thing that you would have before you that you don't have now is that the facts are not conditionally admitted but conclusively established. That is, I don't intend to prove much of anything except the petition and what gives it a little life and substance. If respondent would unconditionally withdraw his answer to the petition, and we could come before this court today or at some other time and argue to this court or to the referee the reference back to the court, on these facts assuming the court knows them and we all know them, what's the ap-

propriate disposition. I would be delighted to do that. I would be delighted to save the time. The impediment to saving that time is the respondent's answer, the part that's not conditional, which denies, qualifies, adds to, etc., a great many of the allegations of the petition. So, if we could get back to you expeditiously with just the facts you have before you today and which you believe you know from the other cases, I would be glad to do that. But, I believe the question should be posed of the respondent. I, I'm not sure I answered both your questions.

JUSTICE: Let's put it in other words. We cannot at this hearing impose any discipline beyond that set out in the proposed disposition in the conditional admission.

MR. WERNZ: That's absolutely correct.

JUSTICE: If you reject that then you go back before the referee.

MR. WERNZ: That, that's correct unless the court attempts to inject itself in some other manner by giving an indication to the respondent, and the director what an appropriate disposition on these facts would be. And I recognize that that would be unprecedented, but then this hearing is already unprecedented I believe.

* * *

STATE OF MINNESOTA
IN SUPREME COURT

CX-86-343

In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota.

ADDENDUM

The attached documents contain the Director's and Mr. Perl's actions in response to this Court's August 1, 1986,

opinion, and demonstrate the Director's insistence that the order was executed and Mr. Perl's reliance upon its finality:

1. Letter of August 4, 1986, of Director to Mr. Perl demanding compliance with Rule 26.
2. Letter of August 4 of Mr. Perl to counsel Mr. Nordby inquiring about compliance, with notations of August 11 discussion.
3. Letter of August 6, 1986, of Director to counsel regarding costs under the Court's opinion.
4. Letter of August 13 and Affidavit of Mr. Perl of compliance with Rule 26.
5. Letter of August 13 of Director to Supreme Court regarding costs (excluding attachments which are on file).
6. Letter of August 13 of Director to counsel regarding costs.
7. Letter of August 13 of Respondent's counsel regarding costs (also excluding attachments).
8. Letter of August 25 of Director to Respondent's counsel regarding firm letterhead, and citing Rule 25 on required cooperation.
9. Letter of August 27 of Respondent's counsel Nordby to Director in response to the foregoing.
10. Letter of August 28 of Respondent's counsel Nordby to Director inquiring about pro bono.
11. Letter of August 28 of Respondent's counsel Nordby to Mr. Perl, responding to letter of August 4.
12. Letter of August 29 of Respondent's counsel Nordby to Director regarding new letterhead, enclosing copy.
13. Letter of September 2 of Director to Respondent's counsel, *threatening* to take action against Mr. Perl.

14. Letter of September 8 of Director to Respondent's counsel, responding to letter of August 28 regarding pro bono work, refusing to assist.
15. Letter of September 8 of Respondent's counsel Nordby to Director, (responding to letter of September 2) in which Respondent agreed to comply with the Director's demands despite disagreement as to the propriety of those demands, and stating the Director's actions were inconsistent with his petition for rehearing.
16. Letter of September 11 of Respondent's counsel Nordby to Director, further requesting commencement of pro bono work and pointing out the unfairness of the Director's position.
17. Letter of September 12 of Director to Respondent's counsel concerning trust account interest under the Court's decision.
18. Letter of September 15 of Respondent's counsel Meshbesher in response to foregoing letter, and reassuring the Director "we are attempting to fulfill, as quickly as possible, all of the conditions imposed by the Supreme Court."
19. Letter of September 15 of Director to Respondent's counsel Nordby, demanding transfer of stock and additional information about stationery.
20. Letter of September 18 of Director to Respondent's counsel Nordby regarding pro bono, again refusing assistance.
21. Letter of September 18 of Respondent's counsel Nordby to Director responding to letter regarding stock, and enclosing *second,* new letterhead.

(Meanwhile all documents and materials in the law

firm were changed, and copies of these numerous items will be supplied to the Court on request.)

22. Letter of October 2 of Director to Respondent's counsel in response to letter of September 18, demanding further action and *again threatening* action under Rule 25.

DIRECTOR OF
LAWYERS PROFESSIONAL RESPONSIBILITY
444 LAFAYETTE ROAD
SUITE 401
ST. PAUL, MINNESOTA 55101
612-296-3952

August 4, 1986

PERSONAL AND CONFIDENTIAL

Ronald I. Meshbesher, Esq.
1616 Park Avenue
Minneapolis, MN 55404

Re: In Re Petition for Disciplinary Action against NORMAN PERL, an Attorney at Law of the State of Minnesota.
File No. CX-86-343.

Dear Mr. Meshbesher:

I enclose a copy of the Minnesota Supreme Court's recent disciplinary order in the above case.

This letter notifies you of respondent's obligations under Rule 26, Rules on Lawyers Professional Responsibility, a copy of which is enclosed.

Within 15 days after the effective date of the court's order, respondent must file an affidavit with this office showing:

1. Full compliance with the court's order and the notice requirements of the rule;

2. All other state, federal and administrative jurisdictions in which respondent is admitted to practice; and

3. The residence or other address where communications may be directed to respondent.

Copies of all notices must be attached to the affidavit.
If you have any questions, please contact me.

Very truly yours,

William J. Wernz
Director
/s/KENNETH L. JORGENSEN
Assistant Director

KLJ/TAH/rlb
Enclosures (2)

LAW OFFICES

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608 SECOND AVENUE SOUTH
MINNEAPOLIS, MN 55402
TELEPHONE (612) 339-4511
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August 4, 1986

Mr. Jack Nordby

Attorney at Law
1616 Park Avenue
Minneapolis, MN 55404

Dear Jack:

The firm and I have several questions to which we would like your response as quickly as as you can regarding my recent one year suspension.

You have already indicated that I am still a lawyer, but suspended from the practice of law for one year, and therefore, this prohibits me from doing various things as a lawyer, however, what is our responsibility as follows:

1. Can I sign office checks? Trust Accounts? General Account? Payroll Account?

2. Can the corporate name remain the same on the door, stationery, pleadings, checks?

3. Do I have to remove my individual name from the list of attorneys on the door and stationery?

4. Can I hold stock in our professional corporation in my name?

5. Can I retain my title as an officer of the corporation?

6. Am I able to sign forms for the various governmental agencies, such as quarterly reports, returns, etc.

7. Can I do administrative and para-legal work?

I have read Rule 26 carefully. As you know, we are a corporation, and all of the clients are clients of the office. You have told me that I am to write only to clients whom I personally am representing and not to all of the clients of the office. Is this correct?

I am also enclosing herein a copy of the proposed letter to the various clients for your approval.

Jack, one other thing: To show my good faith in this matter, perhaps, you could talk to the Director about my starting to do some pro bono work even during this year of suspension. I am sure that there are some agencies which could use some free help even though I know that I could not represent them in Court, etc. I am sure that there are other matters that I could do. Will you see whether the Board is interested in getting me started on this?

Yours very truly,

/s/ NORMAN PERL

Norman Perl
NP/mq
Enc.

DIRECTOR OF
LAWYERS PROFESSIONAL RESPONSIBILITY
444 LAFAYETTE ROAD
SUITE 401
ST. PAUL, MINNESOTA 55101
612-296-3952

August 6, 1986

PERSONAL AND CONFIDENTIAL

Ronald I. Meshbesher, Esq.
1616 Park Avenue South
Minneapolis, MN 55404

Re: Perl

Dear Mr. Meshbesher:

As we recently discussed on the telephone and as mandated by the Supreme Court in its extraordinary order of August 1, 1986, our position is that reasonable expenses, costs and disbursements in this matter total $247,228.27.

For your consideration I enclose a summary of expenses and summary of hours as support for our position. You should know that time and expense records were not maintained in the *Perl* case until April 11, 1983. As you know, much had occurred prior to that date. You should also know that the modest hourly rates of $50 for attorneys, $25 for legal assistants and $10 for other employees were used in calculating the hours total.

We await your response. I have drafted the affiidavit adverted to by the Supreme Court and absent an agreement on amount and terms, I am prepared to submit the affidavit on or before August 15.

Very truly yours,

William J. Wernz
Director
By /s/PHILLIP D. NELSON
Philip D. Nelson
Senior Assistant Director

PDN/rlb
Enclosures

LAW OFFICES
DEPARCO, PERL, HUNEGS,
RUDQUIST & KOENIG, P.A.
SUITE 565
608 SECOND AVENUE SOUTH
MINNEAPOLIS, MN 55402
TELEPHONE (612) 339-4511
TOLL FREE (800) 328-4340

August 13, 1986

Mr. William J. Wernz, Director
Lawyers Professional Responsibility
444 Lafayette Road, 4th Floor
St. Paul, MN 55101

Re: In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota

Dear Mr. Wernz

Enclosed you will find my Affidavit, and copies of the notices that I have sent out.

Yours very truly,

/s/NORMAN PERL
Norman Perl
NP/mq
Encs.

STATE OF MINNESOTA
IN SUPREME COURT
CX-86-343

In the Matter of the Application for the Discipline of Norman Perl, an Attorney at Law of the State of Minnesota.

AFFIDAVIT OF NORMAN PERL

STATE OF MINNESOTA)
) SS
COUNTY OF HENNEPIN)

NORMAN PERL, being first duly sworn on oath, in compliance with Rule 26 of the Lawyers Professional Responsibility, states:

1. That your affiant has fully complied with the provisions of the Order of the Supreme Court of the State of Minnesota, and with this Rule 26.

2. That your affiant has been admitted to practice law in the Supreme Court of the State of Minnesota, in the Supreme Court of the United States, in the Circuit Court of Appeals for the 8th Circuit and in the Circuit Court of Appeals for the 10th Circuit.

3. That any communications may be directed to affiant's home at 20670 Linwood Road, Excelsior, Minnesota 55331, or at 608 Second Avenue South, Suite 565, Minneapolis, Minnesota 55402, where your affiant expects to be doing paralegal work part time.

4. That attached hereto are copies of all notices that I have sent in connection with Rule 26.

5. That your affiant has no papers or property to which any client is entitled in my possession, however, your affiant would comply with any requests for any papers or property if such requests were made.

/s/ NORMAN PERL
Norman Perl
Attorney Registration No. 85170

Subscribed and sworn to before me this 13 day of August, 1986.

/s/ VIRGINIA L. RANZ
Notary Public

DIRECTOR OF
LAWYERS PROFESSIONAL RESPONSIBILITY
444 LAFAYETTE ROAD
SUITE 401
ST. PAUL, MINNESOTA 55101
612-296-3952

August 13, 1986

PERSONAL AND CONFIDENTIAL

Honorable Douglas K. Amdahl
Chief Justice
Supreme Court of Minnesota
State Capitol
St. Paul, MN 55155

Honorable John L. Simonett
Associate Justice
Supreme Court of Minnesota
State Capitol
St. Paul, MN 55155

Honorable Glenn E. Kelley
Associate Justice
Supreme Court of Minnesota
State Capitol
St. Paul, MN 55155

Honorable Rosalie E. Wahl
Associate Justice
Supreme Court of Minnesota
State Capitol
St. Paul, MN 55155

Honorable George M. Scott
Associate Justice
Supreme Court of Minnesota
State Capitol
St. Paul, MN 55155

Honorable Lawrence R. Yetka
Associate Justice
Supreme Court of Minnesota
State Capitol
St. Paul, MN 55155

RE: In Re Petition for Disciplinary Action against
NORMAN PERL, an Attorney at Law of the
State of Minnesota.

Supreme Court File No. CX-86-343.

Dear Chief Justice Amdahl and Associate Justices:

We submit, as directed by the Court, the attached affidavits and attachments supporting our position on respondent's

requirement to pay a reasonable sum toward reimbursement of the Director's expenses, costs and disbursements in this proceeding. While a compromise was contemplated and discussed, the ultimate dispute was over whether any attorney's fees of the staff was intended to be included by the Court.

We argued, and do so now, that attorney's fees were contemplated by the Court and appropriate in this extraordinary and lengthy proceeding. Upon oral argument of respondent's conditional admission, the Director indicated his office had expended over $200,000 of Minnesota attorney registration fees in this case, a sum which obviously included attorney's time. Attorney's fees may be appropriately included in an award of costs pursuant to Rule 24, Rules on Lawyers Professional Responsibility (RLPR), and the Court's use of the word "expenses" broadens the usual award of monetary reimbursement in disciplinary actions. Rule 22, RLPR, describes and defines the Director's "expenses" and clearly includes attorney compensation.

We submit the Court has ample authority as provided by these rules to include all or any part of the sum claimed and submitted by the Director in the affidavits and attachments.

Respectfully submitted,

William J. Wernz
Director
By Phillip D. Nelson
Senior Assistant Director

PDN/rlb
Enclosures
cc: Ronald I. Meshbesher

DIRECTOR OF
LAWYERS PROFESSIONAL RESPONSIBILITY
444 LAFAYETTE ROAD
SUITE 401
ST. PAUL, MINNESOTA 55101
612-296-3952

August 13, 1986

PERSONAL AND CONFIDENTIAL

Ronald I. Meshbesher, Esq.
1616 Park Avenue
Minneapolis, MN 55404

RE: In Re Petition for Disciplinary Action against NORMAN PERL, an Attorney at Law of the State of Minnesota.
Supreme Court File No. CX-86-343.

Dear Mr. Meshbesher:

Enclosed and served upon you by mail please find the Director's Affidavit in Support of Reasonable Expenses, Costs and Disbursements, Affidavits of Mary R. Danforth, Attachment 1—Summary of Expenses Incurred by Director's Office, Attachment 2—Summary of Time Spent by Director's Office, and Procedural History in the above matter.

Very truly yours,

William J. Wernz
Director
By /s/ PHILLIP D. NELSON
Phillip D. Nelson
Senior Assistant Director

PDN/rlb
Enclosures

August 13, 1986

Wayne O. Tschimperle
Clerk of Supreme Court
230 State Capitol Building
Minneapolis, MN 55155

Re: In the Matter of the Application for the Discipline of
Norman Perl
Appeal No. CX-86-343

Dear Mr. Tschimperle:

Enclosed for filing in the above-entitled matter is the original and 14 copies of Respondent's Affidavit Concerning Expenses, Costs and Disbursements, copies having been personally served on the Director's office, Lawyers Professional Responsibility on this date.

Yours truly,
Jack S. Nordby

JSN:lr
Encs.
cc: William Wernz,
LPRB

OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY
520 LAFAYETTE ROAD
FIRST FLOOR
ST. PAUL, MINNESOTA 55101
612-296-3952

August 25, 1986

PERSONAL AND CONFIDENTIAL

Ronald I. Meshbesher, Esq.
1616 Park Avenue
Minneapolis, MN 55404
Jack S. Nordby, Esq.
1616 Park Avenue
Minneapolis, MN 55404

Re: Norman Perl

Gentlemen:

Attached is a photocopy of Mr. Perl's August 13, 1986, letter, without attachments. I am writing concerning the letterhead used.

Is this the letterhead currently used by the DeParcq firm? If so, does the firm intend to continue to use this letterhead? If the firm does not intend to continue to use the letterhead, when will it cease doing so and what modifications will be made?

Please explain how the letterhead does not involve a false or misleading communication about Norman Perl's status as a suspended lawyer, particularly in light of his intention to do paralegal work with the firm.

Pursuant to Rule 25, Rules on Lawyers Professional Re-

sponsibility, I request your written reply within 10 days. Thank you.

Very truly yours,

/s/ WILLIAM J. WERNZ
William J. Wernz
Director

WJW/rlb
Enclosure

LAW OFFICES
MESHBESHER, SINGER & SPENCE, LTD.
1616 PARK AVENUE
MINNEAPOLIS, MINNESOTA 55404
(612) 339-9121

1010 AMHOIST TOWER
ST. PAUL, MINNESOTA 55102
(612) 227-0799

August 27, 1986

William Wernz
Director
Lawyers Professional
Responsibility
520 Lafayette Road
First Floor
St. Paul, MN 55101

Re: Norman Perl

Dear Mr. Wernz:

In response to your letter of August 25, 1986 to Mr. Meshbesher and me, and pursuant to Rule 25, we advise you as to your concern about Mr. Perl's stationery:

1) New stationery was ordered promptly after the Supreme Court's order.

2) Because of the very short time to comply with Rule 26, with which Mr. Jorgensen's letter informed Mr. Perl he must promptly comply, the stationery was not available when the letters in question were sent.

3) New stationery is now being used and will be during the suspension.

4) It is extremely difficult for me to understand, in any event, how letters which specifically state that Mr. Perl is unable to practice, or a letter to your office, could be misleading in any respect even with Mr. Perl's name still listed among the lawyers. Certainly none of the recipients of these letters could have been misled.

5) If you have any authorities or guidelines concerning this other than the Rules of Professional Conduct and Minn. Opinion 8, I would appreciate receiving copies or citations.

Yours truly,

/s/ JACK S. NORDBY
Jack S. Nordby

JSN:lr

LAW OFFICES
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MINNEAPOLIS, MINNESOTA 55404
(612) 339-9121
1010 AMHOIST TOWER
ST. PAUL, MINNESOTA 55102
(612) 227-0799
August 28, 1986

William Wernz
Director of the
Lawyers Professional Responsibility
520 Lafayette Road
St. Paul, MN 55101
Re: Norman Perl

Dear Mr. Wernz:

Mr. Perl has asked me to inquire of you as to what pro bono work he may do, wishing to comply with the terms of his suspension and understanding, of course, that he cannot practice law as such during this period. He is willing and anxious to put his experience and abilities to work wherever they may be most needed and effective.

Please advise me.

Yours truly,

/s/ JACK S. NORDBY
Jack S. Nordby

JSN:lr
cc: Mr. Perl

A-60

LAW OFFICES
MESHBESHER, SINGER & SPENCE, LTD.
1616 PARK AVENUE
MINNEAPOLIS, MINNESOTA 55404
(612) 339-9121
1010 AMHOIST TOWER
ST. PAUL, MINNESOTA 55102
(612) 227-0799
August 28, 1986

Norman Perl
608 Building
Room 565
608 Second Avenue South
Minneapolis, MN 55402

Dear Mr. Perl:

This letter is in response to the inquiries in your letter of August 4, 1986, and will confirm our personal discussion of these matters at our office shortly after you wrote to me, in which you requested guidance.

These opinions and advice are based on my experience and research to date, and although I will do some additional research I have no reason to believe any authority to the contrary exists. If I learn otherwise, I will let you know. As I have told you, you are a lawyer in temporarily suspended status, not a non-lawyer.

1. As to signing checks: Minnesota Opinion 12, copy attached, requires lawyers to sign trust account checks. Since you are a lawyer, I imagine I could advise you that you may sign such checks, but anticipating that the Director will construe the Opinion otherwise it would probably be

more prudent for you not to do so. Similarly, as to other checks, I find no authority stating you cannot sign, and Opinion 12 suggests you can under the principle *inclusio unius est exclusio alterius.* To avoid petty and time-consuming disputes, however, and to avoid further expense in fees if it should be challenged, as a purely practical (as opposed to ethical or legal) matter I would recommend you let someone else sign the checks — provided, of course, this would not cause injury to any client or other person.

2. As to the corporate name: My research to date indicates no authority precisely on this point, but it is my opinion that the name of the corporation need not be changed.

You remain a licensed but suspended professional. As I have told you, Im not an expert in corporate law, but my reading of the Minnesota Rules of Professional Conduct, the Courts' opinions and the statutes on professional corporations (especially *Minn.Stat.* Ch. 319A), lead me to believe that since you are not deceased and there has been no "loss" of your license (as would be the case with disbarment) you may remain a stockholder, officer or director. This, however, depends upon my construction of *Minn.Stat.* sections 319A.11, 12 and 16 which refer to a person who is "licensed" (which, as I have said, I believe you legally are), or who has suffered the "loss of his license to render professional service" (which, as I have said, I believe you have not). I do suggest, however, that you review these statutes, as well as those cross-referenced in Chapter 319A, make your own evaluation of them, and seek another opinion if you wish.

Please note that if my interpretation should be incorrect, *Minn.Stat.* section 319A.12 requires transfer of shares

within 90 days if it should be applicable to you. I base my opinion here in part on the facts that a) in adopting the professional corporations statutes the legislature intended to approve and encourage such corporations, and b) the status of suspension, as opposed to disbarment (or death, resignation or disability), is not intended to have such collateral consequences, but to permit the license to remain in effect subject only to the conditions imposed by the Court; as you know, the Court's opinion makes no mention of these matters. I might also note that since a petition for rehearing is pending at this time, and even if it were granted you could not be suspended for a longer period or disbarred, and since such a petition stays the judgment (if it is a valid petition), it would in any case be premature for you to take any action because the only result of a rehearing could be affirmance, or remand to a referee, in which case the suspension would be lifted pending the referee proceedings. Of course, since the Director has ordered you to comply with Rule 26, and you have done so, it may be moot since you are in fact suspended, but the petition for rehearing certainly confuses your status. I think you have been correct in complying with the Director's demand even though it would have been arguable his own petition may have made it premature. All of this, of course, is subject to the general proscription on anything that is misleading or deceptive, as is the rest of this letter.

3. Your name on list of attorneys and the door: As I told you, the Director takes the position your name must be removed, and I understand this has been done so the question may be moot. (My personal opinion is that there is no absolute requirement for suspended lawyers to do this as

long as no one is misled or deceived. But I agree with your decision to follow the Director's preference.)

4. Your stockholdings: See paragraph 2 above, §319A.16.

5. Your title: See paragraph 2 above, and §319A.16.

6. Signing forms: My opinion is that you can sign forms so long as there is nothing misleading in doing so, and so long as there is no specific statute or rule to the contrary. You should not, of course, sign *as a practicing lawyer,* or sign anything required to be signed by a practicing lawyer. The question is very broad, however, and I can only suggest you examine carefully each form and any rules which may apply to it.

7. Administrative and paralegal work: In my opinion you may do these, so long as they are not things that *only* a practicing lawyer can do, such as signing pleadings, signing trust account checks, appearing in court, attending depositions, etc. In fact Mr. Wernz's recent letter inquiring about your letterhead indicates he is apparently aware you are doing paralegal work, to which he seems to have no objection. Ron Meshbesher informed me the Director's office has told him you may do so. I enclose a copy of Minn. Opinion 7 which applies to paralegals and persons "not duly admitted" (which I believe does not apply to you in your suspended status).

In summary, because you have expressed on several occasions your intention to act only with propriety and according to the Court's opinion, it appears to me you are in compliance with Rule 26 and other applicable provisions. I understand you have written to all clients who consider you

personally to be their lawyer, and spoken with most or all of them as well, and I have examined and approved the letter you sent. Because of the arguable ambiguity of the corporate statutes and my lack of expertise in that area, I have suggested you obtain another opinion, and I assume you will discuss this with your associates. If I am in error and you must transfer your stock and remove your name, you should also comply with any statutory or other requirements for amending the articles, the corporate name, and so forth, of course, within the specified times. In that event you may wish to enter an agreement with your associates for the handling now and upon your resumption of practice.

I might add that because of the rather peremptory attitude, pedantry and pettiness the Director's office has used in recent communications (e.g. about your letterhead and Rule 26), it is unfortunately necessary to assume that office will apparently attempt to find violations or impropriety wherever it can, and to avoid disputes you may wish to resolve doubts against yourself, though not required to do so.

Finally, you have asked me to inquire of Mr. Wernz as to the pro bono work, and I have do so in the letter of which I enclose a copy.

Yours truly,
Jack S. Nordby

JSN:lr
Enc.

August 29, 1986

William Wernz
Director of the
Lawyers Professional Responsibility
520 Lafayette Road
St. Paul, MN 55101

Re: Norman Perl

Dear Mr. Wernz:

Further to my letter of August 28, regarding Mr. Perl's stationery I enclose a copy of the new letterhead. I might add Mr. Perl has also had his name removed from the list of lawyers at the entrance to his office.

Yours truly,
Jack S. Nordby

JSN:lr
Enc.

OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY
520 LAFAYETTE ROAD
FIRST FLOOR
ST. PAUL, MINNESOTA 55101

612-296-3952

September 8, 1986

PERSONAL AND CONFIDENTIAL

Ronald I. Meshbesher, Esq.
Jack S. Nordby, Esq.
1616 Park Avenue
Minneapolis, MN 55404

Re: Norman Perl/*Pro Bono* Services

Gentlemen:

I am writing in reply to Mr. Nordby's August 28 letter regarding *pro bono* work. Paragraph Six of the Court's August 1 Opinion provides that "*Upon reinstatement,* respondent . . . shall perform a reasonable number of hours of *pro bono* legal service as the Director specifies for such persons or through such agencies as the Director designates." Your letter appears to suggest that Mr. Perl is obliged *during his suspension* to do *pro bono* work. If I am misunderstanding you, please give me a call and clarify your point. Also, if you think I am misreading the Opinion, please point out my mistakes specifically.

I would expect that sometime shortly before Mr. Perl's rein-

statement, we should meet to specify Mr. Perl's obligations to perform *pro bono* legal services.

Very truly yours,
/s/Wm. J. Wernz
William J. Wernz
Director

WJW:ma

OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY
520 LAFAYETTE ROAD
FIRST FLOOR
ST. PAUL, MINNESOTA 55101

612-296-3952

September 2, 1986

PERSONAL AND CONFIDENTIAL

Ronald I. Meshbesher, Esq.
1616 Park Avenue
Minneapolis, MN 55404

Jack S. Nordby, Esq.
1616 Park Avenue
Minneapolis, MN 55404

Re: Norman Perl

Gentlemen:

I am writing regarding the new letterhead of the DeParcq, Perl law firm.

I regard the name of the professional association as a false

or misleading firm name, in violation of Rule 7.1, Rules of Professional Conduct.

Rule 5.4(d) forbids other firm attorneys to practice in the professional corporation if Mr. Perl owns any interest in the professional association or is a corporate director or officer thereof. If Mr. Perl has no such association with the firm, and is a nonlawyer, the firm name appears to me to be false and misleading. Please send me the original signed and dated minutes and other documents of the professional association indicating Mr. Perl's removal as a shareholder, director or officer.

I am sure that you are aware of the Minnesota Supreme Court's recent holding and opinion regarding the especially close scrutiny of the activities of a suspended lawyer. *In re Jorissen*. It is my view that Mr. Perl's allowing his name to be used in a professional association in which he (I assume) formerly had an interest, does not comport with the Rules or the Court's opinion.

I intend to take appropriate action regarding Mr. Perl and the firm name. I will wait 10 days to do so, so that I can take into account whether Mr. Perl persists in allowing his name to be used and to consider any arguments or authorities you may wish to present regarding my opinion.

Very truly yours,

/s/Wm. J. Wernz
William J. Wernz
Director

WJW/rlb

LAW OFFICES
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1616 PARK AVENUE
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(612) 339-9121
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September 8, 1986

William Wernz
Director of
Lawyers Professional
Responsibility
520 Lafayette Road
St. Paul, MN 55101

Re: Norman Perl

Dear Mr. Wernz

We received your letter of September 2 stating the new DeParcq letterhead violates Rules 7.1 and 5.4(d). Your reading of both Rules is, in my opinion, entirely incorrect and unsupported by any authority (*Jorissen* is not even pertinent by analogy), and may indeed be inconsistent with pertinent Minnesota statutes regulating professional corporations. Mr. Perl is neither dead nor a non-lawyer; he is temporarily suspended and thus his name in the *title* of a *corporation* is neither misleading nor improper, just as the names of deceased or retired lawyers are not proscribed in this context. Obviously I would not have approved the letterhead, much less voluntarily sent it to you, if Mr. Perl or I believed there was anything improper about it. Frankly,

I have other things of more apparent importance demanding my attention, and I am not at all happy with the suggestions we have not been cooperative.

Nevertheless, out of our deference to your office, and to yourself personally as Director, and in the hope that at long last we may put this matter to rest, Mr. Meshbesher and I have discussed your letter with Mr. Perl, reviewed the research I did on the question heretofore, and despite my continuing conviction that your position is incorrect, Mr. Perl has elected to comply. To this end he will immediately order new stationery and will recommend appropriate action as to the corporate name and stock transfer at the next corporate meeting. I must add that I consider this yet another unanticipated penalty imposed on Mr. Perl in addition to the Court's order, just as we did not contemplate your damaging petition for rehearing, or the enormous "costs" you demanded, or for that matter, the great additional cost of your petition for rehearing, the expense of responding, and the damaging publicity.

Incidentally, when the Minnesota Statutes require a change (as I contend they do not in this case) they allow 90 days to transfer stock, etc., in a professional corporation. See Ch. 319A.

Despite our decision to capitulate to your wishes, rather than argue (much less litigate) the point, I would be interested, as I said in a previous letter, in any authority *you* have requiring this change. To say it is misleading is in my judgment either 1) clearly wrong or 2) to put a lot of firms in trouble who use names of departed lawyers.

Your repeated insistence upon compliance with Rule 26 as you interpret it, certainly underscores our contention that rehearing is inappropriate, and inconsistent with your office's

own actions. We suggest that, in view of our compliance with your wishes, you withdraw the petition.

Yours truly,

/s/JACK S. NORDBY
Jack S. Nordby

JSN:lr
cc: Norman Perl
Ronald Meshbesher

LAW OFFICES
MESHBESHER, SINGER & SPENCE, LTD.
1616 PARK AVENUE
MINNEAPOLIS, MINNESOTA 55404
(612) 339-9121
1010 AMHOIST TOWER
ST. PAUL, MINNESOTA 55102
(612) 227-0799

William Wernz
Director of
Lawyers Professional
Responsibility
520 Lafayette Road
St. Paul, MN 55101

Re: Norman Perl/Pro Bono

Dear Mr. Wernz:

Thank you for your letter of September 8, responding to our inquiry about Mr. Perl's pro-bono obligation.

You are, of course, correct in stating that grammatically

the pro-bono requirement is in the sentence (paragraph 4) beginning "Upon reinstatement . . . ." But the intervening clause refers to probation which obviously must follow reinstatement, whereas the pro-bono work could supposedly be done earlier, so long as it is consistent with the suspension's effects or an exception were made as to Mr. Perl's ability to practice in that restricted way.

I do not know precisely what the Court intended, but I cannot think of any good reason why it would not be in everyone's best interest to have Mr. Perl do some or all of this work during the suspension, and it would particularly benefit those persons or agencies immediately in need of such assistance. In any case, it seemed to Mr. Perl, and to me, to let you know he is ready, willing and able to get at that work as soon as you or the Court directs, or we may agree upon its nature.

In the absence of a good reason for delaying this, it appears to me an unfair and unnecessary financial, psychological and physical burden to require the pro-bono work at the time of reinstatement when he will be attempting to reestablish his practice.

Yours truly,

/s/ JACK S. NORDBY
Jack S. Nordby

JSN:lr
cc: Ronald Meshbesher
Mr. Perl

OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY
520 LAFAYETTE ROAD
FIRST FLOOR
ST. PAUL, MINNESOTA 55101

612-296-3952

September 12, 1986

PERSONAL AND CONFIDENTIAL

Ronald I. Meshbesher, Esq.
Jack S. Nordby, Esq.
1616 Park Avenue
Minneapolis, MN 55404

Re: Norman Perl

Gentlemen:

Condition Two of the Supreme Court's order of August 1, 1986, states that respondent and his law firm shall promptly refund the interest earned on client funds to clients to whom it is owed, to the extent practically ascertainable and feasible, otherwise to IOLTA.

The Director's position on the amount of money to be paid to the clients or the IOLTA Board under this condition is set forth in the Stipulation on Trust Account Facts which was sent to you by letter of June 5, 1986. To recap, the Director has determined that during the years 1975 through January, 1980, $45,688.79 was earned as interest on trust account funds by the DeParcq, Anderson, Perl and Hunegs law firm. This had not been broken down by client. You

may review the stipulation to see how that figure was derived. If, under the terms of Condition Two, it is necessary to designate an accountant to implement the accounting and refund procedure, the accountant will also determine how to calculate interest earned on the funds of particular clients.

I understand from previous discussions with you that the respondent does not agree with the figure of $45,688.79. I need to know your position on this issue, to determine whether to designate an accountant under the terms of the Supreme Court order. What amount of money do you calculate should be paid, under Condition Two, and what is the basis for your calculation? As this is a condition for reinstatement, it should be taken care of promptly to facilitate reinstatement.

I wish at this time to raise an additional concern about interest earned on trust account funds. Both Mr. Perl and Mr. Shapiro, in their respective depositions, said that after December, 1979, or January, 1980, when Mr. Perl learned that interest was being earned on trust account money, all investment activity ceased. Thereafter, the Director's office was given to understand that the law firm retained no interest on further trust account investments, and that any further investments from the trust account were for particular clients to whom the interest was then paid.

Our review of post-1980 records provided by respondent indicates that from June through September, 1982, the law firm earned in excess of $37,000 in interest on trust account funds, which interest was then paid by checks into the general account. This has been verified by the confirmation notices, the general account journal, and the trust account journal. Attachment One hereto sets forth the

dates and check numbers of checks from the trust account to the general account which we perceive as being interest payments on RPs. If it is the case that this interest was earned on money in the trust account, and was retained by the law firm without payment over to any clients, this amount should be included in the interest to be paid to IOLTA. If you have an alternative explanation for these 1982 transactions, please let me know.

Thank you for your attention to these matters. Please reply within two weeks concerning respondent's fulfillment of Condition Two.

Very truly yours,

William J. Wernz
Director
By /s/ CANDICE M. HOJAN
Candice M. Hojan
Senior Assistant Director

CMH:ma
Enclosure

September 15, 1986

Candice Hojan
Lawyers Professional
Responsibility
520 Lafayette Road
First Floor
St. Paul, MN 55101

Re: Norman Perl

Dear Ms. Hojan:

Our accountant Mr. Bremer is completing his audit of the Deparcq firm's trust account. When we receive his final

report we will be able to hopefully negotiate settlement of this issue.

I have today mailed a copy of your September 12 letter to Mr. Perl so that he can analyze the questions you raise concerning the 1982 interest earnings.

We are attempting to fulfill, as quickly as possible, all of the conditions imposed by the Supreme Court. You will be hearing from us again. Thank you for your courtesies.

Yours truly,

Ronald I. Meshbesher

RIM:lr
cc: Jack Nordby
Norman Perl

OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY
520 LAFAYETTE ROAD
FIRST FLOOR
ST. PAUL, MINNESOTA 55101
612-296-3952

September 15, 1986

PERSONAL AND CONFIDENTIAL

Ronald I. Meshbesher, Esq.
Jack S. Nordby, Esq.
1616 Park Avenue
Minneapolis, MN 55402

Re: Norman Perl

Gentlemen:

I have received Mr. Nordby's September 8 letter.

I assume that the reference to Minn. Stat. Ch. 319A is

specifically to section 319A.12, subd. 1. This requires stock transfer within 90 days. This means only that the statute will not be violated so long as the transfer occurs within 90 days. Rule 5.4(d), Rules of Professional Conduct, has no such time period.

Please provide the corporate documents I requested in my previous letter. If no action has been taken by the professional association since August 1, please so state. In that event, please also state the date of the next corporate meeting and whether the necessary actions regarding Mr. Perl's status as a shareholder, director and officer will be proposed for action at that meeting.

You indicated that new stationery has been ordered. Please state the date when its arrival and use is expected.

Very truly yours,

/s/ WILLIAM J. WERNZ
William J. Wernz
Director

WJW:ma

OFFICE OF
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ST. PAUL, MINNESOTA 55101
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September 18, 1986

PERSONAL AND CONFIDENTIAL

Jack S. Nordby, Esq.
1616 Park Avenue
Minneapolis, MN 55404
Ronald I. Meshbesher, Esq.
1616 Park Avenue
Minneapolis, MN 55404

Re: Norman Perl/*Pro Bono*

Gentlemen:

I am writing in reply to your September 11 letter.
I read paragraph 6 of the Court's order to require "*pro bono* legal service" upon reinstatement, and not before. When you say the sequence could "supposedly" be otherwise, I do not share your supposition nor see the grounds for it.
In any event, I do not share your judgment that the Court's order in this regard is "unfair and unnecessary," and even if I did, I would not be in a position to alter the Court's order.

Very truly yours,

/s/Wm. J. Wernz
William J. Wernz
Director

WJW/rlb

LAW OFFICES
DE PARCQ, HUNEGS, RUDQUIST & KOENIG, P.A.
SUITE 565
608 SECOND AVENUE SOUTH
MINNEAPOLIS, MN 55402

TELEPHONE (612) 339-4511
TOLL FREE (800) 328-4340

September 18, 1986

William Wernz
Director of
Lawyers Professional
Responsibility
520 Lafayette Road
St. Paul, MN 55101

Re: Norman Perl

Dear Mr. Wernz:

We have received your latest letter regarding the corporation. Mr. Perl is out of town, but we will forward your letter to him and reply further when he returns, in about ten days or so.

I can inform you that new stationery was ordered the same day I last wrote to you, has been received, and a copy is enclosed. The envelopes have been ordered but not yet received.

Although I want to repeat that our research has led to the opinion that Mr. Perl is not a "non-lawyer," and therefore not affected by Rule 5.4 or the professional corporation statutes, we previously agreed to comply with your inter-

pretation and wishes as to letterhead, stock and office-holding, in our effort to go beyond the minimum requirements of Rules 25 and 26 and be cooperative. I would, however, be interested in, and again request you provide me with, citations of any authorities addressing these questions where a corporation is involved.

Yours truly,

Jack S. Nordby

JSN:lr
Enc.
cc: Norman Perl

OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY
520 LAFAYETTE ROAD
FIRST FLOOR
ST. PAUL, MINNESOTA 55101

612-296-3952

October 2, 1986

PERSONAL AND CONFIDENTIAL

Ronald I. Meshbesher, Esq.
1616 Park Avenue
Minneapolis, MN 55404
Jack S. Nordby, Esq.
1616 Park Avenue
Minneapolis, MN 55404

Re: Norman Perl

Gentlemen:

Thank you for your September 18 letter.
Your letter does not respond to the questions or request for documents made in my September 15 letter regarding Mr. Perl's status in the professional corporation.
Your September 18 letter states your, "opinion that Mr. Perl is not a 'non-lawyer' and therefore not affected by Rule 5.4 or the professional corporation statutes, . . ." The Professional Corporation Act does not appear to me to use the term, "non-lawyer" and presumably would not, as it is applicable to corporations of different professions. The Act specifically provides,

> . . . Every director and every officer of a professional corporation shall be a professional licensed to render professional service of a type the corporation is authorized to render.

§ 319A.16. The Act also provides that after loss of a professional license,

> . . . All of the shares of stock owned by such shareholder or his membership shall be transferred to and acquired by the professional corporation or persons qualified to own such shares of stock or membership.

§ 319A.12. The Act further provides,

> Any board, or any employee designated by such board, shall have the right at all reasonable times of free access to all books and records of any professional corporation . . . and may examine under oath the officers, directors, and employees of any such corporation . . .

Pursuant to the Act, and to Rule 25, I repeat the request made in my September 15 letter and in my earlier letter for the corporate documents of the DeParcq, *et al.*, Professional Association showing any action taken by it since August 1. I also repeat my request for the date of the next corporate meeting and whether the necessary actions regarding Mr. Perl's status as a shareholder, director and officer will be proposed for action at that meeting.

If you do not reply clearly and cooperatively to this third request, I will infer that your client does not intend to

furnish the materials and information sought pursuant to the authorities cited.

Very truly yours,

/s/Wm. J. Wernz
William J. Wernz
Director

WJW/rlb

CX-86-343
STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Application
for the Discipline of Norman Perl,
an Attorney at Law of the
State of Minnesota.

MOTION FOR RECONSIDERATION
AND PETITION FOR REHEARING

Summary of Grounds

MR. PERL HAS PERFORMED TO HIS SERIOUS DETRIMENT, AT THE DIRECTOR'S REPEATED INSISTENCE AND THREATS OF CHARGES OF NON-COOPERATION, THE REQUIREMENTS OF THIS COURT'S AUGUST 1, 1986 ORDER, IN RELIANCE ON THE FINALITY AND PROPRIETY OF THIS COURT'S ACTION, IN WAYS THAT ARE IRREVOCABLE; THE DIRECTOR INTENTIONALLY OR NEGLIGENTLY MISLED THIS COURT IN THE PETITION, IN FAILING TO INFORM THE COURT OF HIS THREATS TO MR. PERL AND OF MR. PERL'S COM-

PLIANCE; REMAND IS UNAUTHORIZED, UNCONSTITUTIONAL AND WOULD CAUSE IRREPARABLE INJURY; MR. PERL'S COMPLIANCE WITH THE DIRECTOR'S DEMANDS MADE THE CASE MOOT.

MOTION FOR RECONSIDERATION AND PETITION FOR REHEARING

Norman Perl, by his counsel, Ronald I. Meshbesher, Jack S. Nordby, Meshbesher, Singer & Spence, Ltd., hereby moves for reconsideration and petitions for rehearing under Rules 127 and 140, *M.R.C.A.P.* on this Court's order of October 6, 1986, upon the following grounds:

1. Due process of law would be violated and irreparable injury inflicted by vacating this Court's decision of August 1, 1986 and remanding this matter for hearing, because Mr. Perl's suspension has been in effect and he has taken irreversible actions in detrimental reliance on the Court's decision of August 1, 1986, actions taken at the insistence of the Director upon threatened allegations of non-cooperation under Rule 25, all as set forth more fully hereafter and in the attachments hereto. At no time did the Director seek or request a stay of this Court's previous order, but on the contrary aggressively and intimidatingly enforced it. The Director has deliberately or negligently misled this Court in failing to inform the Court that he has repeatedly demanded compliance with Rule 26 and the Court's order, and as a result Mr. Perl has been forced to take numerous actions to his irreversible detriment. These demands of the Director, of course, were inconsistent with his own petition for rehearing; thus the Director has attempted to have the best

of both worlds, and consigned Mr. Perl to the worst of both. (See Addendum with attached letters)

3. Mr. Perl has thus been denied his Constitutional right to be heard by the Court on the issues decided in the order, which goes far beyond the petition for rehearing. Nothing in constitutional law is more elementary than the right to be *heard* before adverse judicial action; Respondent has not been heard; yet this Court has granted relief against Respondent, which was not prayed for in the petition, and on which Respondent has *not been heard*. The Court cannot vacate an official published opinion with a mere order.

* * *

6. This order, besides violating the Respondent's rights to due process and fundamental fairness, undermines the Rules' procedure for conditional admissions and will irrevocably discourage and confuse use of that procedure.

7. Despite his petition for rehearing, the Director has repeatedly insisted that Mr. Perl comply with Rule 26 and he has done so in several ways that cannot now be rescinded and which will have irreparable adverse consequences if this matter is reopened. The Court's decision and order of August 1, 1986 (See pp. 8-9, slip opinion) and Mr. Perl's actions to date are:

1) He has specifically agreed to pay any sum ordered by the Court and filed the affidavit required within 15 days.

2) He agreed to pay the interest and retained an accountant to determine the amount, whose work is nearly finished.

3) He settled the *Klein* ($335,000) and *Gilchrist* ($16,150) cases, possibly to his detriment under pressure of this Court's order.

4) He is reviewing his firm's books to comply with the Director's demands, and counsel have provided him prototype books furnished at a recent seminar by the Director.

5) a. He has settled *Gilchrist* and *Klein*, as noted above, under compulsion of this Court's order.

b. He arranged on September 30, 1986 to take the Professional Responsibility examination in November.

c. He is in compliance with Continuing Legal Education requirements.

6) He has offered to begin pro bono work immediately, but the Director has concluded that should not begin until after his period of suspension.
He has therefore already fully complied so far as possible with the Court's entire order in reliance on his belief it was final.

8. In addition:

A. He has been suspended from practice since August 4, 1986.

B. He has notified his clients of his suspension and thus terminated or interrupted his representation of them; at least two clients discharged Respondent's firm after being told of the suspension.

C. The humiliation and injury caused by these letters

might have to be repeated if the proceeding were reopened.

D. He has had his name removed from his letterhead and office door and wall, at the Director's insistence having changed the firm's stationery, cards, numerous forms, bank accounts, checks, directory, telephone yellow pages and other places the firm name appears.

E. Despite serious doubt as to its necessity under the applicable law, he has taken steps to resign his presidency and Directorship and relinquish his stock ownership in his firm, at the Director's repeated insistence, to his irreparable damage and financial loss.

F. He cannot now resume the practice of law because, under compulsion of this Court's opinion and the Director's insistence:

1) He has no clients.

2) He has informed the courts in all jurisdictions where he practices, in Minnesota and elsewhere, of his suspension.

3) He has informed other counsel of his suspension.

4) He has no lawyer's position in his firm.

5) The Court's opinion resulting in his suspension on August 4, 1986 has made it impossible to obtain new clientele, because it is now widely believed that he is suspended.

6) The uncertainty of these proceedings and the time and attention he would have to devote to them would be all-consuming.

G. He has suffered irreparable harm and incurred substantial expense in his complying with Rule 26.

H. The shock of the unprecedented reversal of this Court's decision has made it difficult emotionally for Mr. Perl to defend himself at this time.

9. The Director has notified the American Bar Association's National Disciplinary Data Bank in Chicago, Illinois, of Mr. Perl's suspension, and this Data Bank disseminates such information nationwide to courts and bar authorities.

10. The Court's and Director's actions have therefore placed Mr. Perl in an egregiously *worse* position than if his conditional admission had been originally rejected, and the matter had gone to hearing, when he had the emotional and physical stamina to defend himself, and a clientele and therefore an income which has also been removed because of compliance with the order.

* * *

12. No legitimate purpose could be served by a referee's hearing. The Director himself stated to this Court at oral argument, in response to a specific question from the Court, the conditional admission provided "a sufficient factual basis for this Court to determine the appropriate discipline", adding that he hoped the referee's report would contain "the same factual allegations as are in the petition":

* * *

22. The order's violation of Mr. Perl's federal constitutional right to due process of law, recognized in lawyer disciplinary proceedings by the Unted States Supreme Court, also would invite and require intervention of the federal courts in the state disciplinary process. *In re Ruffalo,* 390 U.S. 544 (1966).

23. The principles of *res judicata,* collateral estoppel and law of the case and mootness forbid remand, and the efficacy of those doctrines would be egregiously undermined if this order were to stand.

24. The United States Supreme Court has held that lawyer disciplinary proceedings are quasi-criminal and require due process. *In re Ruffalo,* 390 U.S. 544 (1966). The Director's and the Board's and the Court's actions here are the equivalent of double jeopardy or, worse, of ordering a retrial over his objection of a defendant who has served his sentence in substantial part, or, worse still, of enhancing a sentence beyond the limits of a lawful and executed plea bargain, after the sentence is substantially served. *See Santobello v. New York,* 404 U.S. 257 (1971). The Court once having accepted, imposed and executed the terms of the conditional admission, due process precludes any more *severe* dispositional recommendation by the referee, or more severe disposition by this Court. Therefore the referee's hearing could at most result in only a) the same disposition or b) a more lenient disposition or c) a finding of no misconduct warranting discipline. As *Ruffalo, supra,* held, no discipline can be imposed for conduct not charged, and here *all* the charges were conditionally admitted; no facts remained to be found. The blows of the lash that have already fallen on Mr. Perl's back by his suspension cannot be re-

called; the order has inflicted a further unbargained for blow; and a referee's hearing itself would be tantamount to cruel and unusual punishment. *See Santobello v. New York, supra; In re Ostensoe,* 264 N.W. 569 (Minn. 1936). Contrary to the Director's and the Board's assertions, the sanctions imposed were quite severe.

* * *

WHEREFORE, Respondent respectfully prays for:

1. An order vacating the order of October 6, 1986, and reaffirming the order of August 1, 1986;

2. In the alternative, the right to be heard on briefs and orally before any order adverse to Respondent issues; or

3. In the alternative, an order remanding to the referee solely to determine the unresolved issues as to the amount of costs to be paid.

4. A stay of any further proceedings until this motion is finally determined in the Minnesota and, if necessary, the federal courts.

CX-86-343
STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Application
for the Discipline of Norman Perl,
an Attorney at Law of the
State of Minnesota

RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION AND PETITION FOR REHEARING

STATEMENT OF FACT

* * *

LEGAL ISSUE

WHERE THE SUPREME COURT ACCEPTED A LAWYER'S ADMISSION, CONDITIONED UPON THE IMPOSITION OF A ONE-YEAR SUSPENSION FROM THE PRACTICE OF LAW, TO A DISCIPLINARY PETITION FILED BY THE SUPREME COURT'S DIRECTOR OF LAWYERS PROFESSIONAL RESPONSIBILITY, IN A FORMAL ORDER WHICH BECAME EFFECTIVE BEFORE THE DIRECTOR'S PETITION FOR REHEARING, AND THE DIRECTOR ENFORCED THE ORDER BY THREATENING ADDITIONAL DISCIPLINARY ACTION IF THE LAWYER DID NOT METICULOUSLY COMPLY WITH THE ORDER, FORCING THE LAWYER TO CEASE PRACTICING LAW AND OTHERWISE DETRIMENTALLY RELY ON THE ORDER TO HIS IRREPARABLE DAMAGE, DOES THE COURT'S ORDER, ISSUED WITHOUT REHEARING TWO MONTHS LATER, VACAT-

ING THE ACCEPTANCE OF THE CONDITIONAL ADMISSION, VIOLATE DUE PROCESS OF LAW, AND THE PRINCIPLES OF NON-IMPAIRMENT OF CONTRACT, FUNDAMENTAL FAIRNESS, ESTOPPEL, MOOTNESS AND *RES JUDICATA?*

ARGUMENT

* * *

The crux of the matter, which may arise in various contexts, is that a citizen is Constitutionally entitled to rely upon actions of the government (including, certainly, not only a prosecutor's representations, but *a fortiori* a Court's order as in this case), and he is entitled to specific performance.

The double jeopardy clause, for example, protects state-created expectations with respect to conviction and its consequences of finality. *See Green v. United States,* 355 U.S. 184, 187 (1957). The due process clause protects state-created expectations even with respect to probation revocation and the granting of parole. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979).

* * *

D. *Federal and State Constitutional Rights are Seriously Threatened.*

When lawyers are put into a position of irretrievable injury, because of court orders, the federal courts grant protection to avoid irreparable injury. *Maness v. Meyers,* 419 U.S. 449, 460, 95 S.Ct. 584, 592 (1975). Lawyers are guaranteed due process of law. *Spevack v. Klein,* 385 U.S. 511, 87 S.Ct. 625 (1967). Any attorneys' discipline pro-

cedures which turn out to become a trap to the attorney violate a person's right to constitutional due process of law. *Committee on Professional Ethics v. Johnson,* 447 F.2d 169 (3rd Cir. 1971).

The federal courts are fully authorized to enter state court proceedings to protect constitutional rights. *Sekerz v. Supreme Court of Indiana,* 685 F.2d 202 (7th Cir. 1982). Any state enforcement unconstitutionally applied may be attacked during the pendency of state proceedings. *Taylor v. Kentucky State Bar Association,* 424 F.2d 478 (6th Cir. 1970). Suspension of constitutional rights may cause irreparable injury. *Brunton v. United States,* 518 F.Supp. 223 (D.C. Ohio 1981). This Court enforces injunctive relief against administrative agencies if there be irreparable harm during the exhaustion of the administrative remedy. *State v. District Court,* 253 Minn. 462, 93 N.W.2d 1, 4 (1958); *Thomas v. Ramberg,* 16 N.W.2d 18, 21 (Minn. 1953).

Recurring unconstitutional actions against a lawyer may constitute irreparable harm. *Kelly v. Gilbert,* 437 F.Supp. 201, 222 (D.C. Mont. 1977). *See also Middlesex County Ethics Comm. v. Garden State Bar Ass'n.,* 457 U.S. 423 (1982), and *District of Col. Court of Appeals v. Feldman,* 460 U.S. 462 (1983).

Because attorneys' discipline cases are quasi-criminal, it may fairly be concluded that the final order of August concluded the jeopardy of Mr. Perl. A re-trial now, if not precisely and literally in violation of the fifth amendment proscription against double jeopardy in the ordinary criminal sense, is closely analogous so that; a re-trial now after a final order complied with would violate all fundamental principles of due process of law as guaranteed by the Fifth

and Fourteenth Amendments to the United States Constitution, and their Minnesota counterparts.

The courts speak of a need to terminate litigation. That was the purpose for Mr. Perl's conditional admission. The Director at oral argument said he, too, has other things to do. The Court accepted the conditional admission. That is in the spirit of general offer and compromise, to end the litigation the parties give up some of their claims and accept less than 100 per cent of their desired remedy. That was done in good faith by Mr. Perl, jeopardy has attached, and the Court should vacate the order of October 6, 1986.

* * *

II. *The Court's Reasons for Vacating Its Unambiguous Order Accepting the Conditional Admission are Factually and Constitutionally Insufficient.*

* * *

B. *There Could be no Additional Evidence at a Referee's Hearing.*

The October 6 also opinion states that further information filed by the Director "leads us to believe we were not fully apprised of all the facts and circumstances at the time of our decision." Contrary to the suggestion of the petition for rehearing and the Court's October 6 order, there is not, and constitutionally could not be any other evidence of misconduct at a referee's hearing. This principle, a constitutional principle, was established long since *In re Ruffalo,* 390 U.S. 544 (1968), which held discipline may not be based on charges not pleaded. The conditional admission of its very nature allowed and required this Court to deem all the allegations, as drafted by the Director himself, as

admitted and thus fully proved for purposes of the conditional admission. *Nothing* factual remains to be decided here. Nothing. The only open issue is the details of costs to be paid, a purely legal question. At oral argument the Director repeated several times in response to questions from the Court, that a referee's hearing would not add any matters of substance to the petition before the Court.

* * *

III. *Rehearing Was Unauthorized and a "Hearing" was Denied.*

A. *The Rules On Lawyers Professional Responsibility Preclude Rehearing.*

This Court in issuing the Rules on Lawyers Professional Responsibility created comprehensive procedural rules for disciplining lawyers. Rule 2 provides in part that "such investigations and proceedings shall be conducted in accordance with these Rules."

The Court is thoroughly familiar with the procedural devices, but it must be emphasized that Rule 10 is exhaustive on the matters pertinent hereto. It provides in Rule 10(b):

> If the lawyer admits some or all charges, or tenders admission of some or all charges conditioned upon a stated disposition, the Director may dispense with some or all procedures under Rule 9 and file a petition for a disciplinary action together with the lawyer's admission or tender of conditional admission. This Court may act thereon with or without any of the procedures under Rules 12, 13, or 14. If this Court rejects a tender of conditional admission, the matter be remanded for proceedings under Rule 9.

There is absolutely no provision for a rehearing in these matters, nor for the interposition of any other parties beyond the Director and the attorney involved. This is exclusive and comprehensive and necessarily excludes all other procedures.

The fact that there have been petitions for rehearing in other disciplinary cases does not mean they are valid; it simply means their validity has not previously been challenged, and the Court has not had to rule. There are, incidentally, no rehearings in the Court of Appeals, so there is nothing unique in this proposition.

B. *The Rules of Civil Appellate Procedure Do Not Provide Rehearing.*

The Court may have been induced by the Director and the Board to consider this matter as a petition for rehearing pursuant to Rule 140.01, Minnesota Rules of Civil Appellate Procedure. That, of course, cannot apply because this Court in issuing those rules described the scope of the rules in Rule 101:

> These rules govern procedure in the Minnesota Supreme Court in civil appeals; in criminal appeals insofar as the rules are not inconsistent with the Rules of Criminal Procedure or Minnesota Statutes; in proceedings for review of orders of administrative agencies, boards or commissions; and on applications for writs or other relief in civil proceedings which the Supreme Court or a justice thereof is competent to give. * * *

This rule excludes any application to the present litigation. The application of the Civil Appellate Rules violates

this Court's appellate rules themselves, the Rules on Lawyers Professional Responsibility, and therefore Mr. Perl's right to due process of law. It is hornbook law that courts and agencies are bound by their own rules and regulations.

It would be difficult to envision a procedural situation so devoid of basic safeguards as in the present posture of this case. It is obvious that agencies must follow their own rules and regulations, as a necessary procedural due process protection. *Berends v. Butz,* 357 F.Supp. 143 (D.C. Minn. 1973). This Court is as bound by the procedural rules and regulations as the United States Attorney General was in *United States v. Shaughnessy,* 337 U.S. 260, 74 S.Ct. 499 (1954), where the Court stated that "in short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." 347 U.S. at 267, 74 S.Ct. at 503. For a similar conclusion, *see Vitarelli v. Seaton,* 359 U.S. 535, 540, 70 S.Ct. 968, 973 (1959).

C. *The Director Had His Opportunity Before And At Oral Argument And His Arguments Are Untimely.*

The Director did not even deign to reply to the original conditional admission, sent a brief letter in response to the amended admission, and was given full opportunity to argue fully. *After* the decision he apparently decided for some undisclosed reason to view the matter differently. This is not a ground for rehearing, not good practice, not professional, and must bring in question the good faith of either the earlier or the later stance.

CONCLUSION

This Court's October 6, 1986 order is unprecedented, uniquely damaging, and was apparently made in ignorance of the many important developments after its previous order, to wit: That Mr. Perl, relying on the August 1 order, and at the Director's threatening insistence, stopped practicing law and took other irreversible steps. He cannot be returned to the status quo ante. The damage is irreparable. And the damage resulted directly from good faith reliance on this Court's order. Mr. Perl performed his side of the agreement embodied in the order.

This Court's decision was more than severe enough in itself, and even the Director repeatedly told the Court he found it offered in good faith and not wholly unacceptable—not, that is, until it became effective. Then he vigorously pursued its penalties, and at the same time, inconsistently petitioned for rehearing.

The petition stated absolutely no valid ground for rehearing under Rule 140, yet the Court anomalously "granted" the petition but gave Respondent *no hearing* on these crucial issues, remanding directly without rehearing for a referee's hearing that can only be emotionally and financially disastrous, and cannot, as a constitutional matter, accomplish anything.

This Court ordered Mr. Perl to do a number of agonizing things, not the least to surrender for a year the license to practice the profession that has been his life's work and to announce it to all concerned.

And the Director had ample opportunity to make timely objections. He did not reply *at all* to the original conditional admission. He answered the amended admission with a short

letter, agreeing to abide by the Court's decision. But after that admittedly not wholly unreasonable decision came down something happened and the result is insupportable.

The integrity of the legal process, with which the Court is quite rightly concerned, requires that parties be permitted to come before the courts, be heard, and then required to obey resulting decisions. Respondent and the Director were heard on the conditional admission; the Court ruled; Respondent obeyed. The transcript of the oral argument, which we urge the Court to review, conclusively undermines the propriety of the Director's petition and the October 6 order, issued without knowledge of the Director's demands and Respondent's compliance, and which decided issues on which Respondent has never been heard.

The order of August 1 should be reinstated, without or after oral argument, with a remand to the referee limited only to the question of costs.

Respectfully submitted,

MESHBESHER, SINGER & SPENCE, LTD.
/s/ RONALD I. MESHBESHER
Ronald I. Meshbesher
Attorney Reg. No. 72229
/s/ JACK S. NORDBY
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COUNSEL FOR RESPONDENT

October 22, 1986